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Vol. II

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 505

THE UNITED STATES OF AMERICA, PETITIONER

v.

[illegible]

ON WRIT OF CERTIORARI TO THE [illegible]

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The Court: Have you anything further?

Mr. McGohey: No.

The Court: You have no further testimony on this phase of the case?

Mr. Keenan: No, your Honor, we have no further testimony on this phase of the case.

The Court: All right. Do you wish to be heard, General?

Mr. Ansell: If your Honor please, your Honor has heard the evidence upon this independent issue. I should like to point out certain salient facts that vary in that evidence to which we think if the authorities be applied this statement taken from Major Radovich by Mr. Flynn should not be admitted. Those salient facts, as I see them, are these: Major Radovich reported at Mitchel Field on August 9th in the afternoon. By order of General Hunter, an order which, as I remember it, had been previously given, Major Radovich was immediately thrust into confinement in ward 15, a ward obviously designed and used for the confinement of insane military personnel who needed to be restrained from possible suicide or violence. That was August 9th.

In September, I think it appears to have been the 5th or 6th, Mr. Flynn, an agent for the Federal Bureau of Investigation, appeared in that ward, and in the cell, I so characterize it, where Major Radovich was, accompanied by another agent and also by an Army officer. There a statement was taken from Major Radovich.

Major Radovich had been held there for nearly a month under circumstances that I shall not rehearse to your Honor. You remember that.

There had been no action taken so far as Radovich knew looking to any kind of judicial proceeding, military or civil. I think it is a fair inference from the

record, indeed, I think it is a necessary inference, factual in every respect, that the military authority was engaged in holding Radovich in this confinement while the civil authorities operated on him. The military authorities from my point of view of the military law were certainly holding him unlawfully there. And the civil authorities were, from my point of view, engaged, by reason of the working arrangement that they had with the military authorities in using Radovich's confinement, there likewise unlawfully. The military authorities from my point of view were holding him there unlawfully and the civil authorities from
1907 my point of view were using that detention by the military authorities and not performing their duty under the law which governed the civil procedure.

I think, your Honor, that this case falls almost squarely, legally speaking, squarely within the Anderson case. I would like to discuss that case because I think it is so pertinent here.

In that case the authorities, the local authorities of the State of Tennessee, down near some of the TVA dams, had arrested and apprehended this man Anderson and others apparently for a violation of local law. And almost immediately the F.B.I. agent appeared. The offense charged there, as I remember it, ultimately charged, was that Anderson and others had
1908 engaged in the slowing up of the great power line down there, several of them, the TVA, and the Government in effect owns, of course, the TVA. And subsequently the indictment.

The F.B.I. man, with the State authorities, apparently sometimes all working together and sometimes all separately, but the F.B.I. authorities got a statement—we call them confessions and be done with it—out of Anderson before Anderson had been taken to a United States Commissioner or committing magistrate

and before the State officials had taken him before the State committing officials.

The Supreme Court of the United States in that case buttressed their decision upon the fact that he was held and detained there without having been taken as soon as might be to a federal committing magistrate. The Court said in that case—I haven't got it here——

The Court: Here it is, if you want it.

(Volume handed to Mr. Ansell.)

Mr. Ansell: Thank you very much.

The Court said in the effect that the detention of the defendants by the State officers in this case was in violation of the statute of Tennessee which provides that no person can be committed for any criminal matter until examination thereof be first had before some magistrate. They said in effect that the federal investigators and federal authorities were relying upon and really taking advantage of this defendant while he was being held by the State authorities.

They comment upon the fact—I think it was the detention, the detention without taking him before a committing magistrate—that is the basis of that decision.

There were other facts present not altogether dissimilar from the facts which are present here. They mentioned the fact that this man was unaided by relatives or friends or counsel, and that the men were unlawfully held for some days. I figure it out to be about thirty-six hours; it may have been longer. And that this questioning that he was subjected to was in a hostile atmosphere. The men were not arrested by federal officials until April 30th and they were not arraigned before a [illegible]eral commissioner until that date, the moment that the F.B.I. moved in and determined to make the arrest. Then they took them before

the committing magistrate, but not until after they had been held some thirty-six hours, I figure it out, by the State authorities, except one Ballou, who was held longer, apparently until May 2nd.

The Court uses this language: There was a working arrangement between the federal offices and the sheriff of Cook County which made possible abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with State officers.

1913 Here I think the principle at the base of the decision and leading to the decision in this case is equally applicable here. I think, and I do not wish to misrepresent the United States Attorney, but I think it is a fair inference that the United States Attorney realized that the statement taken in this ward for the insane would not stand up under that decision. Then what was it that the United States Attorney did here? March 15th, 16th or 17th, somewhere along there, he has his agent bring Radovich in, or if they prefer, Radovich comes in. He comes in by an arrangement, as the result of an arrangement, between the office of the United States Attorney and the military authorities. He comes in and he makes another statement. I think the evidence shows that that statement was the

1914 same statement in every substantial aspect of it as the statement that has been made in this so-called "nut ward".

The agent, Flynn, never, to me at least, gave a reason or satisfactory explanation as to why a second statement was wanted. He testified that the second statement was basically the same as the one that was made in ward 15. This second statement upon its face shows that it was supplementary to the statement

that Mr. Flynn had first taken. There can be no question in the world but that these statements are the same in all substantial respects.

Now, I must be at liberty to indulge my thoughts to the reason why it was so, that the second statement was taken by Flynn. There has long been in the office of federal prosecutors the idea that the first statement or the first action taken by the federal authorities might be unlawful actions, but that anything derived out of and also a product of this unlawful action was all right.

As far back—probably twenty or twenty-five years ago—in the Silverthorne Lumber Company case 1916
against The United States, which your Honor may or may not have on your desk, 251 U. S. 385, the Supreme Court of the United States utterly disagreed and repudiated any such practice or doctrine.

That was a case where the federal authorities went out and seized unlawfully certain papers of this lumber company, and they admitted that that was an unlawful seizure, but they said in effect: "We can take photostatic copies of these things and run them before a grand jury."

Mr. Robb reminds me they tried to subpoena them, the originals, and then used, as I remember it, photostatic copies. But, however that may be, the Supreme Court of the United States, when upon a proceeding 1917
for contempt the lumber company's representatives and the company itself having failed to obey this subpoena, said that the first step was wrong and you admit it. The first step was the unlawful seizure of this company's papers, and there is nothing that you can do by taking a second step that will cure the invalidity of the action that you admit you took.

That is an interesting case to me. Justice Holmes said: "The proposition could not be presented more-

nakedly. It is that although, of course, its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

The Court said: "Weeks v. United States, to be sure, has established that laying the papers directly before the grand jury was unwarranted, but it is taken
1919 to mean only two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

The Anderson case is an effort, a decision, by the Supreme Court of the United States to prevent the use as evidence of statements made when the officers of the law have not done their duty in taking the suspect before a federal commissioner.

The Nardone case that went up, I suppose, from this jurisdiction——

The Court: That is right.

1920 Mr. Ansell: —involved the question of whether or not information derived from unlawful wiretapping was usable. There was a section which probably more or less with clarity forbade the use of wiretapping. The Government in that case contended, "Well, it is not the information that we got from tapping the wire; it is the information that we derived from the wiretapping."

There were learned opinions in that case by the Circuit Court of Appeals of this jurisdiction, and the Supreme Court of the United States said: "The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no Section 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversations, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in the administration of federal criminal justice, and we therefore brought the case here for disposition.

"We are here dealing with specific prohibition of particular methods in obtaining evidence. The result 1922
of the holding below is to reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of Section 605 would largely stultify the policy which compelled our decision in Nardone v. United States. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed"—quoting from the first decision—"inconsistent with ethical standards and destructive of personal liberty."

They go on: "What was said in a different context in Silverthorne Lumber Company v. United States is pertinent here: 'the essence of a provision forbidding 1923
the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.'

"A decent respect for the policy of Congress must save us from imputing to it a self-deceiving if not disingenuous purpose.

"Here, as in the Silverthorne case, the facts improperly obtained do not become sacred and inaccessible.

If knowledge of them is gained from an independent source, they may be proved like any others," and they say to the prosecutor, "You may go ahead but you may not use any that was gained as a result of this unlawful conduct."

The Court: We will take a ten-minute recess.

(Short recess.)

The Court: General, if it does not interrupt your presentation, I should like to ask you for some information as to military law here.

Mr. Ansell: To the best of my ability, of course, I shall answer your Honor.

1925 The Court: I am rather optimistic about your ability.

There are several statutes of the United States which in substance provide that when a man is arrested by federal officers he shall be promptly or immediately or forthwith taken before a United States Commissioner for arraignment or hearing. Is there any analogous provision in military law that a person held for a military offense be taken before any officer for arraignment? Is there anything analogous to the statute which I have just mentioned in the military law?

Mr. Ansell: Analogous in this respect, your Honor, if we can pursue an analogy so far, that the 70th—

The Court: I read the 70th Article of War.

1926 Mr. Ansell: That contemplates or provides, at least it was the intention of Congress to provide, that no man should be arrested or confined and held for any length of time other than a very reasonable time before the military proceeding should start. Your Honor was a distinguished officer in the last war, Mr. McGohey was also; there were others of us I see sitting here.

The Court: On behalf of all of us I thank you.

Mr. Ansell: But that is the truth. I am always pleased to see them, too.

But in the last war certain grave defects in the administration of military justice became patent to all, to thoughtful officers as well as to people in Congress. This 70th Article of War is one of the many articles enacted, for Congress to prevent that very thing, of holding a man and then delaying the trial. Therefore, it is provided in that article, it is reflected in others, that the commanding officer will at once "when any person subject to military law is placed in arrest or confinement, immediate steps will be taken 1928
to try the person accused or to dismiss the charge and release him." Prior to this time an officer could be kept under the old article eight days without much if anything being done about it. Unfortunately, in practice that extended in much greater time because there was no penalty to be visited upon a commanding officer who kept him in more than eight days. It was said to be simply directed. But here "any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct." That would be under the 96th Article, for neglecting his duty.

So, if you will take the 70th Article, it provides that the commanding officer will make an immediate investigation of any charge that is made to him about 1929
another officer or man, and that he shall then send that forward with a statement of his investigation, whatever it was, to the commanding general who exercises general court-martial jurisdiction; that then, while this commanding officer is conducting the investigation, he shall serve a copy of the statement of the charges upon this accused. And then the officer who convenes a court-martial refers the charge and its inves-

tigation accompanying it to his Staff Judge Advocate and his Staff Judge Advocate shall report back, and then the commanding General must proceed to dismiss these charges or to try them, and the words are "that it shall be done immediately, and any officer who is guilty of any unnecessary delay in that matter shall himself be triable."

The Court: But then the article goes on a little further and provides: "When a person is held for trial by general court-martial the commanding officer will within eight days after the accused is arrested or confined, if practicable forward the charges to the
1931 officer exercising general court-martial jurisdiction and furnish the accused with a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay."

What construction do you put upon the phrase "if practicable"?

Mr. Ansell: Well, your Honor, in all of these military statutes we all know that it is far from normal as we in civil life see it. "If practicable", it is my view—if I might digress a little bit, in this case your Honor noticed that the article mentioned "a commanding officer," and then "an officer with authority to convene the general court-martial." Your Honor observed that. We all do. In this case the commanding officer would
1932 have been Colonel Hildreth down there commanding the base. But General Hunter himself became the commanding officer ordering the arrest and ordering the charges, and he was also the authority to convene the court-martial. So it is not a case of where a commanding officer forwards charges up to a convening authority of a general court-martial.

Coming down more specifically to your question, your Honor, "if practicable", the whole purpose of the article and the report of the committee which is ad-

verted to in the beginning of that court-martial manual is we insist, says Congress, that you are not going to keep those men there, and I should say that the burden would be greatly upon any commanding officer who said, "Well, it was not practicable to try the man." Or, coming to this very case, this officer was put in this ward and kept there for about six weeks. Nothing done. Surely there could be no argument based upon practicability there. And General Hunter's staff judge advocate said, to which Mr. McGohey enters a mild demurrer I think, that the reason why we delayed the court-martial of this man is the fact that Mr. McGohey has made the specific request that he be not court-martialed, awaiting action to be taken against the civilians in this case. The delay in this case is due to that fact. It was practicable of course at Mitchel Field, not in immediate face of the enemy, to try a man any time after he reported that.

The Court: It appears that he applied for resignation within twelve days after his confinement. Would it have been practicable to try him until the resignation had been passed upon?

Mr. Ansell: I doubt that that has the slightest thing to do with it, but I will answer you in accordance with the fact as I understand it. He had been kept there. There is a great deal that is not here. He had been kept there. He did tender his resignation, a resignation for the good of the service, and that resignation was held by General Hunter for September, October, November, December, January, February and March before it was forwarded.

The Court: I beg your pardon, sir.

Mr. Ansell: Wasn't it, sir?

The Court: The 27th of January.

Mr. Ansell: Oh, pardon me. But it was returned to him in early March, March 2nd, as I remember it,

and was still held by General Hunter for some time after that. It took him twenty days to get it from his headquarters over to Radovich. In any event, I don't want to travel outside of the record, but he was being held there. He did tender his resignation, having been advised that it would be accepted, because General Hunter had full power, he knew the War Department would act on it, but the War Department didn't act on it. But it didn't go forward until, as your Honor says, three or four months after that.

There is a lot of this talk about co-operation, your Honor. It is here, it is before us. It has been said
1937 that my associate counsel, Mr. Robb, advised him to co-operate no longer. That is true, because every bit of the co-operation of Major Radovich got him in deeper and deeper and deeper. Whatever Mr. Wallace and the United States Attorney may think about the wisdom of counsel in advising Radovich as they did, to my way of thinking it was morally and legally offensive that this man should have been batted about between the civil and military authorities as he was in this case until at last, when he was not getting decent treatment, and he said: "There will be no more co-operation and there will be a trial if you insist, where we will get justice."

I do not suppose I answered your Honor very spe-
1938 cifically.

The Court: I have no complaint to make.

Mr. Ansell: Of course they did not have to try him within eight days, but they should have started the machinery, if practicable, forward the charges to the officer exercising general court-martial jurisdiction, furnish the accused with a copy of it, and make the statement. But surely you can't hold a man if the Army is to pay the slightest attention and respect to the Congress of the United States who, after all, under our

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Constitution make the rules and regulations for the Government and our Army, and hold this man there from August 9th to June 29th of the next year before they proceed against him.

The Court: You do not contend he was in confinement all that time, do you?

Mr. Ansell: I contend that he was in confinement, in this particular confinement, only for six weeks, and that thereafter—we have new language now in the Army, your Honor, and you have heard it—administrative restriction. It is unknown to the law. But he was in arrest after that, his limits being restricted to that post and his activities being restricted to that post until January 2nd, I think it was. He was in arrest with limits; he couldn't go to this place, that place or the other place, and there were great restrictions upon the scope of his communications; he had to get authority everywhere, he had to get authority to consult a lawyer, and it was denied in this very case. I say he was in confinement. That is not the term really; "confinement" means one thing to me, in the Army, too, but this was confinement under the conditions that we have seen here in this ward, this cell. And then after six weeks the Provost Marshal General feeling sympathetic with this man makes a report, as is shown on the record, advising the commanding general, who apparently had forgotten about it, and said, "This man has been in here six weeks," and then immediately the order came down to release him. And he was kept then under a strict arrest, not confinement; he was let out, your Honor, under a strict arrest until January 2nd, three or four months, and then he was kept under a less strict arrest; less strict. He could do some things around the post. And then when they made up their minds to try Radovich, of course he was again put in arrest, and then after he had been

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convicted he was then put in confinement, not in this ward, but in confinement. And then when something went wrong with the court-martial proceeding he was taken out and put under this restricted arrest again, and then after a while he was ordered to A, B, C, D, I don't know why. But now he is not under arrest. He came from a place of duty to duty under Mr. McGohey.

I have taken up an almost intolerable amount of time, your Honor, but there was one other case I wish to mention, then I shall be finished.

1943 The Watson case, Watson v. United States, down here in the Third Circuit, in New Jersey, one of these liquor cases. When the defendants were arrested, or shortly thereafter, their private papers were taken from them and turned over to a prohibition agent, and among those was Watson, the defendant's, pocketbook in which were private papers containing important information for the prosecution. On application Judge Lynch directed that they be returned and that the information there contained be suppressed. But the late Judge William H. Jeffery, United States Commissioner, issued a warrant for the arrest of the defendants and was present when they were arrested. He saw those private papers, he knew their contents. And after the defendants were taken to Toms River, down in New

1944 Jersey somewhere, he had them brought before him again and again and secured statements from them. And while he was testifying about certain initials which were on a receipt objection was made to his testimony on the ground that it was based on information which he had secured from these papers. The objection was overruled, apparently on the ground that Nicolnison had made certain statements about the receipt in response to questions by Judge Jeffery at the time the confession was secured.

The case of Weeks v. The United States established that private papers illegally seized could not be used before a federal grand jury. The Fourth Amendment, however, requires that evidence so secured shall not be used, not simply before a court, but not at all. The Government may not avail itself of knowledge obtained by its own wrongdoing. If they learned of this receipt through this illegal seizure it could not use this information to extort from Nicolaison the statement that those initials were his and then make that statement the basis of the admission in evidence. The objection to it was solid and it should have been sustained.

Now, your Honor, I failed to say that Mr. Flynn 1946
that he had this first statement, taken by him in the same ward, there when he took this statement that is proposed to be put in evidence here, and that he had it on his desk, and that both he and Radovich read it, and that before he began to write, in effect was his testimony, he talked over the statement, the first statement, and then he wrote the second statement, he himself—no stenographer there—he wrote it in his own hand. Beyond all question the second statement is really not a derivative of the first; it is more than that, it is the first.

Your Honor must have observed that I am intensely interested in this case, not that it will affect anybody else; but the Supreme Court is always saying, and 1947
quite properly so, and we need ever to be reminded of it, that that Court will insist upon establishing rules of procedure and evidence, where Congress has not done so, that will insure what it calls a fair and decent trial according to trials had in civilized communities. The conduct of the Government officials in this case, both military and civil, is in my honest opinion inconsistent with that fair and moral procedure that the

Supreme Court has lauded so much and done so much to impose upon the lower courts.

The Court: Do you wish to be heard?

Mr. Keenan: Your Honor, I believe that General Ansell, who has just addressed the Court, was an officer of the United States who actually drafted the Article of War in question, and I have no comments to add to his statements.

The Court: All right, sir.

Mr. McGohey: May it please the Court, the argument this morning is based, as I see it, entirely on the doctrine laid down by the United States Supreme Court
1949 in the McNabb decision and the Anderson decision, which came down about the same time. We do not quarrel with the decision of the United States Supreme Court in those cases. Our position is that the principles in the McNabb case do not apply to the facts as they appear in the case at hand.

Now, I don't concede for a moment that the statement that was taken from Major Radovich in September, 1944, while he was in the hospital at Mitchel Field violated any of the principles laid down in the McNabb decision. But I say that, for the purpose of our discussion here and the proceeding that your Honor is now conducting, it does not make any difference whether it was or was not in violation; and we could assume, purely for the purpose of the argument, that it did
1950 violate the principles of the McNabb decision and that if that were being offered the ruling of the McNabb decision might make it inadmissible. But the McNabb decision and the decisions that it quotes, and the Nardone case and all the other cases, this Watson case, and that whole line of cases, with which I think we of course are all familiar, have in them one factor which is absent in this case, and that is that in those cases, as in the McNabb case, where the statement was taken, as

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the Court said, illegally, when the man was under restraint, and in the Nardone and other cases where the papers were seized illegally, there was always this factor: the defendant in those cases, the defendants, rather, in those cases, maintained at all times that the original seizure or the original statement had been illegally taken and that at no time did their position ever change with respect to that fact. That is not the case here with respect to the defendant Radovich.

Now, this protection against self-incrimination is of course a privilege, a privilege which may be waived, and it is our contention that the defendant in March, 1945, the defendant Radovich, when by the admissions 1952
of everybody concerned he was completely and utterly free of all restraint of any kind, came into the office of the Federal Bureau of Investigation and stated—and his statement will so show—that he voluntarily made the statements which he made on March 15th and March 17th. Now I take it, your Honor, that that was a valid waiver of any right that he had, and I take it that none of the cases that have been cited, and no case that can be found will hold that because a man gives a statement at one time under circumstances which may be said as to make the admissibility of this statement improper, can never thereafter waive that privilege against self-incrimination when he is thereafter free and when he has had the opportunity, as this defend-
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ant did, to consult with counsel.

Now the evidence before your Honor here shows that even while he was in the hospital at Mitchel Field he asked for permission to see a Mr. Bradspies, or an officer or some man named Bradspies, and that he did see him. Now, that is before he gave the statement to the agents in the hospital. Now, coming to the end of September, he was released from the hospital, and the orders, which are in evidence, show that he was

restricted to the base, it is true, and he was excluded by the terms of the order from entering the officers' club on the base, but that is the only restriction that he had. As far as the order shows, he was perfectly free to communicate, either by telephone or, telegraph or by a personal visit by any counsel of his own selection; and certainly when the 2nd of January came he was perfectly free, and the evidence of Flynn is that the man came in to him on many occasions, at least on more than one occasion, without Flynn having called him or called anybody at Mitchel Field to have Radovich to come in to see him.

1955 Now, the General suggests that the September statement was on the desk at the time the March statement was given. Well, that in my opinion, is certainly no argument against the fairness of the agent; rather, I think it is an argument in favor of the fairness of the agent. He was not taking any advantage of Radovich; he was letting Radovich see exactly what he had said in September. And then he made this statement here (indicating), in which he says, "That he knows that these are special agents of the Federal Bureau of Investigation and that he makes the statement of his own volition, and that no threats of force, promise or favor, or duress of any type has been offered to me to induce me to make this statement, and I know that anything I say may be used against me in a criminal

1956 proceeding."

Mr. Robb: Does it say "against"?

Mr. McGohey: It is Government's Exhibit 25 for Identification I am reading from.

(Continuing) "And I have been told that I do not have to make this statement unless I desire to do so."

Now there is no question at all here, your Honor, but that that came up in seizure cases where evidence or

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materials are seized and then the information that appears on the papers is thereafter used in the case.

It is the contention of the Government here that regardless of what happened prior to the 15th of March, on that day this man completely free, under no duress of any kind whatever, of his own free will, waived any privilege against self-incrimination that he had and voluntarily made the statement, and that it is not tainted in any respect by what happened prior to that in the Army or any place else.

Mr. Keenan: Your Honor, I would like to make one observation for whatever rights I have to be heard in this matter.

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The Court: I wish you would exercise that right.

Mr. Keenan: Your Honor, I am glad you raised that, because I would not have said anything if it had not been for a remark made by the United States Attorney.

The Court: All right, go ahead.

Mr. Keenan: The United States Attorney said that everybody in this court room admitted that when Radovich made this statement he was absolutely and entirely free from any restraint of any kind. I would ask the record to show that I am in the court room and that I do not agree with that statement, and I violently disagree with it, especially in view of the fact that we are observing something which I think probably is without precedent in the annals of prosecution in the recorded history of the United States, namely, where a co-defendant in a conspiracy case is ordered by a military authority under whose jurisdiction he now is and who has held him in restraint in an insane ward, to report to the United States District Attorney for duty.

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Now I believe that is the statement. At least, report to him—and if I am wrong in the "duty," I would like to have the language of it read.

Mr. McGohey: May I inquire as of what time Mr. Keenan is talking?

Mr. Keenan: I am talking about the time when he appeared to you to take instructions from you at the beginning of this prosecution. I am saying that he certainly, in my opinion, is not free from restraint when his superior officer orders him, a defendant in a prosecution where punishment includes the right to send him to a United States penitentiary, and that the United States Attorney is representing that branch of the Government that is prosecuting him, that it is weird in the name of justice to order him to report to
1961 the United States Attorney and to remain under his instructions for a given period of time.

To say that that man is absolutely free of restraint, and that everyone so agrees, causes me to rise and deny for the record that I am included in those individuals who have arrived at that conclusion.

Now, at this time, since I understand it is a motion on a voir dire proceeding on the part of counsel for the defendant Radovich, ask that a given statement be excluded, although at all times I contend the authorities will support my position: that the defense is more apparent than real, that we have no interest in this statement. I have said it so many times to your Honor that I fear that I would be offensive if I would repeat it many more times, but just this once: I think the jury
1962 hearing a statement of Major Radovich about the very subject matter of which my clients are accused, and matters that might be determinative of their guilt or innocence, I regard it as requiring much of the human mind to ask that it set those matters aside, and for such reason I believe I have a right to be heard, but not any more at this time, on the technical matters, the cases that hold that this testimony is not admissible.

Mr. McGohey: I do not know that it is necessary, your Honor, to go into that question of this order that was given to Major Radovich.

The Court: No.

Mr. McGohey: Because it is long after the statement.

The Court: Yes. Do you gentlemen wish anything further?

Mr. Robb: No, your Honor.

The Court: We will take a recess now until 2 o'clock, and I will pass on the question at that time.

(Recess until 2 P. M.)

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AFTERNOON SESSION.

The Court: Gentlemen of the counsel, I am of opinion to admit the statement, and will admit it. I will state my reasons. An objection was made to the statement under consideration, the statement which has been offered in evidence on Thursday of March, 1945, and an attack has also been made on the previous statement made in September, 1944.

It is contended that the vice in that statement also vitiates the statement of March, 1945. It is contended that the statement made in September is inadmissible under the doctrine of the McNab case. I do not think that the doctrine of the McNab case renders that statement inadmissible. 1965

As is settled, and as is stated in the McNab case, the mere fact that a confession was made while in the custody of the police does not render it inadmissible. The McNab case is based primarily upon the statute of the United States which requires that a person arrested by a federal

officer must be taken promptly before a committing magistrate for arraignment or for hearing. In the McNab case that statute was not complied with, and the defendants were subjected to treatment which the Court considered improper, and thoroughly improper to have taken place prior to an arraignment.

The Anderson case is similar and analogous. Only there the actual custody was by State officers, but it was shown that the federal officers acted in concert with the State officers.

Under the circumstances here there is no statute applicable which is analogous to the statute under consideration
1967 and which was determinative in the McNab case.

There is no provision in military law requiring that a person charged with a crime be taken before a committing magistrate. There is no such thing as a committing magistrate in military law, just as there is no such thing as a grand jury in military law.

Article [redacted] of the Articles of War does undertake the guarantee [redacted] persons accused of prompt trials. It is provided that:

> "A thorough and impartial investigation must be made when the charges are preferred."

Then it is further provided:

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> "That when any person subject to military law is placed in arrest or confinement, immediate steps shall be taken to try that person accused, or to dismiss the charge and release him. Any officer who is responsible for unnecessary delays in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by a general court-martial, the commanding officer will within eight days after the accused is arrested

or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to his superior officers the reasons for the delay."

Therefore, there is considerable discretion, in my opinion, left to the commanding officer and the convening authority as to when a trial by court-martial shall take place. The phrase "if practicable", and the succeeding sentence providing that if there is delay an explanation shall be made why there was such delay, seems to me to invest in the military authorities considerable discretion in the matter of when a trial shall be had. 1970

Of course, the whole tenor of the article is to provide for prompt trial, but there is a discretion left as to just when that trial shall be had. In this case I cannot see that a trial immediately after the expiration of eight days was practicable.

It is true that this man was placed in confinement in this hospital ward on the 9th day of August. I take it that the evidence on that subject is clear that he was in confinement and awaiting trial by a court-martial. However, I do not think the effect of that is any greater than if he were placed in a house of detention or a jail. He was in custody of the authorities.

But, as I say, I am not prepared to hold that on the 5th of September, which I believe is the date of the statement, 1971 that his custody was illegal, and certainly I do not think that the doctrine of the McNab case applies to it.

The general rule is, as you gentlemen of counsel all know, that the test of a statement's admissibility is whether or not it is voluntary. I do not see anything in the circumstances here to cast any doubt on my conclusion that the statement of September 5th or 6th was an involuntary statement, and I am not prepared to hold and will not hold it inadmissible.

If I should be of opinion that it was inadmissible because of coercion, then it would be my duty, as I understand the law, to determine from the evidence whether or not such coercion has vitiated the first statement, continued through and applied to the second statement.

I find a statement to that effect in Wigmore, page 335, Volume 3 of the Third Edition. In other words, on a question of this kind, if the Court should be of the opinion that an earlier statement was coerced, then it is its duty, of course, to determine whether or not the second statement was induced by the same coercion or any coercion.

As to the statement made and which is now offered in
1973 evidence, the statement made in March, I am satisfied that if there had been any vice in the first statement, that it did not continue and did not apply to the second statement. The defendant had long since been released from confinement. He, in my opinion, was almost as free as any soldier is. If I recall it correctly, at that time he was at Mitchel Field and he was denied the privileges of the officers' club, and was required to get permission to leave there. Any soldier has to get permission, either general or special, to leave his post. So he definitely, in my opinion, was under no confinement or arrest, and, as I say, was about as free as any soldier usually is.

The testimony convinces me that the second statement was made entirely without coercion and was not induced by promises extended to him by anyone in authority. I
1974 would admit the statement of March even if I thought there was any question about the statement in August, although I do not think that statement was coerced.

The decisions indicate to me that the fundamental thought in the matter is that it is the duty of the Court to determine from the surrounding facts and circumstances whether or not there was any circumstance or any circumstances existing which would likely produce an untrue statement.

In other words, if a man is about to be lynched by a mob, naturally he would say anything that would prevent such a consequence, and a statement made under such circumstances would have no probative value.

Considering all the facts and circumstances which have been presented to me, I can find no fact or circumstance which would lead me to believe that the statement now offered was induced by anything which would tend to discredit the truth of it.

Consideration of all the facts and circumstances which I have heard lead me to believe that in making the statement and the prior statements, including the statement referred to in, I think, General Connor's endorsement to 1976
the defendant's resignation, everything leads me to believe that the defendant was actuated solely by a desire to tell the truth, take the consequences, and get the matter behind him as promptly as possible. So the ruling of the Court is to overrule the objection of the defendants and admit the statement.

Mr. Robb: May we have exceptions, if your Honor please?

The Court: You may. Are you ready to proceed?

Mr. McGohey: Yes, your Honor.

The Court: Call the jury. I might say that I will limit the statement to the jury's consideration of the charge against the defendant Radovich as I have to the other statements.

Mr. Keenan: We still want our exception noted. 1977

The Court: Yes, it has been. Where is your witness?

Mr. McGohey: Mr. Flynn was my witness, but I am just going to offer the statement. It has been identified. Yes, I think we had better call the witness Flynn.

The Court: Yes, I think you had better have him back on the stand.

(The following proceedings took place before the jury:)

GERALD J. FLYNN resumed the stand.

The Court: Ladies and gentlemen of the jury, when we parted company there had been offered in evidence a statement which this witness, Mr. Flynn, testified was made to him in March, 1945, and reduced to writing and signed by the defendant Radovich.

I charge you now in similar fashion to the way I charged you when I admitted statements made by the defendants Samuel and Elias Bayer. I am admitting this statement made by the defendant Radovich for
1979 your consideration of the charges here made against the defendant Radovich. I charge you specially that you should not consider this statement or anything in it in your consideration of the cases against the two Bayers. You may consider it and give it such weight as you feel inclined to in your consideration of the case against the defendant Radovich. All right, you may proceed.

Mr. McGohey: I now offer in evidence Government's Exhibit 25 for Identification.

Mr. Robb: If the Court pleases, may we have our objection and exception to this?

The Court: Very well.

Mr. Keenan: And I want to again renew my objection to a charge to the jury, to ask them to recall the
1980 incidents set forth in this paper that is introduced, or about to be introduced or received, as against Major Radovich only, and not as against the two defendants Bayer, on the ground of the practical impossibility of any jury being able to make such distinction and hold it throughout the course of a long trial to their ultimate deliberation.

The Court: Very well. The objection is overruled. You may proceed.

(Government's Exhibit 25 for Identification received in evidence.)

Mr. McGohey: I have no further questions of this witness, your Honor.

The Court: All right. Do you wish to cross-examine?

*Cross-examination by Mr. Keenan.*

Q. Mr. Flynn, you took this statement set forth as Government's Exhibit 25 in your own handwriting and you 1982
dated it March 15, 1945, is that correct? A. Yes, sir.

Q. But it is also witnessed by Mr. McCabe, another F.B.I. agent and yourself? A. Yes, sir.

Q. With a mark 3/17/45, which I assume is March 17, 1945, is that right? A. Yes, sir.

Q. Where was Major Radovich during that time? Did he stay in New York or did he make another trip back, or what happened to him in that period of time, if you can tell us? A. Between March 15 and March 17, I don't know where he was. He was in the office on March 15th and then he came back again on March 17th.

Q. Did you ask him to come back? A. Yes.

Q. Why? A. We had not finished the statement, as I recall it, and I believe Major Radovich had an appointment. 1983

Q. Where? A. I don't know.

Q. Did Major Radovich ask permission to leave? A. No, he just told me that he had an appointment. So I suggested that he come back the following day.

Q. And did he come back the following day? A. No, he told me that he could not come back the following day, but he would make it two days later.

Q. Now, at that time, this was not the first statement that you had taken from Major Radovich, was it? A. No, sir.

Q. You had taken a statement previously some time in September, 1945, is that correct? A. 1944.

Q. 1944, I beg your pardon. Is that right? A. Yes, sir.

Q. What was the date of that statement? A. I would say it was about September 6th, as I recall it.

Q. And where was that statement taken? A. That statement was taken at Mitchel Field at the Santini Hospital.

Q. A hospital for what? A. I don't know. All I know is that it is called the Santini Hospital.

1985 Q. Major Radovich at that time was under lock and key, was he not? A. I don't know that he was under lock and key; he was in the hospital.

Q. Well, do you know whether or not he had had his necktie taken away from him and his belt and other implements taken away from him? A. No.

Mr. McGohey: I object to this line of questioning.

Q. That might have led to his own self-destruction?

The Court: I overrule the objection.

A. No, I don't know.

Q. You had not heard anything about that? A. No, sir.

1986 Q. Do you not know that he was in the hospital for the insane? A. No, sir.

Q. Have you ever heard anything about that before now? A. That he was in a hospital for the insane?

Q. That is right? A. No, sir.

Q. For the psychopathic patients? A. I was taken to Santini Hospital by Lieut.-Col. Miller. I did not know what type hospital it was. I did not ask.

Q. Do you know now? A. I know that you are telling me that.

Q. Is this the first time you have ever heard about that? A. That he was in a hospital for the insane?

Q. Yes. A. Yes.

Q. Or the psychopathic patients? A. I don't recall having been told that before.

Q. Well, I am asking you to your best recollection whether or not this is the first time you ever heard of Major Radovich being in a hospital for the psychopathic patients in the Army? A. Yes, sir.

Q. Is that right? A. Yes.

Q. Do you know the number of the ward? A. No, I don't recall it.

Q. Did you ever know it? A. I may have noted it that 1988
day but I did not commit it to memory.

Q. Did you mark it down? A. No, sir.

Q. Don't you know that it was Ward 15? A. I don't recall whether it was Ward 15.

Q. Was there just one ward at the hospital where you went to see him? A. No, there were numerous wards. There are apparently wings that open off a common corridor.

Q. Do you remember a Mr. Pender out there? A. I don't recall ever hearing that name.

Q. A Sergeant Pender? A. No, sir.

Q. Do you know anything about the fact that he had a man come to take him out for a walk at a specified time in the afternoon? A. No, I don't recall that.

Q. That is all news to you? A. I don't recall that. 1989

Q. Do you know that there was a heavy gate about two hundred pounds swung to his door or outside his door?

Mr. McGohey: I object to this question.

The Court: What date are you referring to?

Mr. Keenan: I am referring to the time in September when he first went out there to see Major Radovich, when he got the first statement from him.

The Court: We have no September statement. The statement I admitted is the statement of March.

Mr. Keenan: Yes, but the witness has testified, I believe, already, that there was another statement that he obtained in September and that he had that statement in front of him at the time he obtained this statement, and I want to inquire about the circumstances.

The Court: All right, go ahead.

Mr. Keenan: I am prepared to show that Major Radovich was in——

Mr. McGohey: I object to that.

1991 Mr. Keenan: —a hospital for the psychopathic patients.

Mr. McGohey: I object, your Honor.

The Court: Wait until you get to it, and I will admit what I think is admissible.

Mr. Keenan: All right.

The Court: Go ahead.

Mr. Keenan: I am a little confused on the question, your Honor. May I have it repeated?

The Court: All right.

Q. (Question read) A. No, I don't.

Q. Did you ever see a key to lock a door before you went in to see Major Radovich at any time out in Santini Hospital? A. No. You mean to his room?

1992 Q. I mean any place out at that hospital. A. No, I don't recall any doors having to be opened.

Q. Having to be opened by keys, I am talking about. A. No, I don't.

Q. Of course you would remember that, Mr. Flynn, if it happened? A. Yes, I would.

Mr. McGohey: Your Honor, I object to this whole line of questioning as immaterial to the admission of

this statement which your Honor has admitted, the last statement.

Mr. Keenan: Your Honor, I contend I have a right to show this jury the circumstances under which it was obtained.

The Court: I will overrule the objection. Go ahead.

Mr. Keenan: May I repeat the question, your Honor?

The Court: Yes.

Q. I am asking you if you would not have remembered if there was a door unlocked before you went in to see Major Radovich? You would recall that, would you not? 1994
A. I think I would.

Q. And your statement is that there was no such thing happened? A. My recollection is that I have no remembrance of any door having to be opened for me to see Major Radovich.

Q. Now, what kind of wire was there outside of his room, if you know? A. I don't know. I believe it was just a common type of screen.

Q. To keep insects out? A. Well, I would presume that.

Q. It was not a heavy wire mesh? A. I don't recall a heavy wire mesh.

Q. About how big was that room? A. Oh, maybe about 10 foot square—I don't recall whether it was an exact square, but I would say about 10 foot. 1995

Q. Would you say that the room was larger than 6 by 9? A. Well, it seemed to be to me.

Q. Now, when you went out there and saw Major Radovich, you knew, of course, that he was in a hospital? A. I knew it after I got to Mitchel Field.

Q. And you would have been able to tell if he had been kept in confinement of the type where people are watched for psychopathic ailments, would you not?

Mr. McGohey: Now, if your Honor please, may I state that I think that this is now Mr. Keenan's witness. This is no cross-examination. I want the right to object to the introduction hereafter of any testimony to contradict what is being said now. I take it that this is direct examination of the witness by counsel for the Bayers.

Mr. Keenan: Your Honor, I have never heard of a witness under cross-examination becoming a direct witness for the cross-examiner.

Mr. McGohey: I have, your Honor, and I assume that your Honor has, too.

1997 Mr. Keenan: If I had a witness under direct examination and he was hostile, it might be permitted as cross-examination, but this is a novelty. I have never heard of the reverse, and he certainly is not my witness and we do not vouch for anything that he says in this case.

Mr. McGohey: Your Honor, there is not any evidence at all here of hostility. As I take it, we are going into something now that was not touched upon in direct at all, and I take it that the purpose is to lay a basis to contradict what is now being testified to by this witness. If that is the purpose of it, I certainly reserve the right to object to anything of that kind because it will be contradicting his own witness. I say that he is making the witness his own with this

1998 examination.

Mr. Keenan: Your Honor, if I might be permitted to observe very briefly, I have never known of cross-examination ordinarily to have any other function than attempting to lay the foundation for disturbing the credibility of the witness or the accuracy of what he says, and I have never known of a man, of a defense counsel, making a Government witness his own wit-

ness because of cross-examining him as to the accuracy of his statements.

Mr. McGohey: I submit that that is not what is being done here. The witness is being examined anew on matters that have not been touched upon on direct examination.

Mr. Keenan: I want to find out, your Honor, how this confession was received.

Mr. McGohey: I object to any statements about the purpose of this examination.

The Court: Will you take the jury out?

(Jury retired from the room.)

The Court: Mr. Keenan, the reason I sent the jury 2000
out is that I want to inquire with regard to this proposition: Inasmuch as I have admitted this statement for consideration solely against the defendant Radovich, have you a right to cross-examine him?

Mr. Keenan: I think, your Honor, under the decision of the Anderson case, that the Court recognizes what I have referred to informally as the realities of the case enough to put us all on notice that if there is evidence that is introduced against one of the co-defendants and that evidence is improperly so introduced, it could have a vital effect upon the deliberations of the jury and their conclusions.

The Court: Just one minute, while I read this. I understand in the Anderson case the criticism was 2001
made of the Court in not strictly in his charge limiting the statement of one in the consideration of the case of that one but permitting the jury to consider the statement as to the other. What do you consider authority for it in your contention right now?

Mr. Keenan: I consider the authority enough, your Honor, to put us on notice that on a vitally important statement of this nature, even though the Court does instruct the jury that it shall not be considered by the

jury excepting as against the defendant Major Radovich, that nevertheless there is enough realism in appraising and assessing the value of evidence that I believe that our Supreme Court will go the added step if required in exposition, that if such evidence is improperly introduced, it will contaminate the entire proceeding as a matter of law.

Furthermore, I want to examine this witness as to his bias or lack of bias, or his accuracy or lack of accuracy in taking this statement because it is going to be my contention that the attitude of the Government has had much to do with the attitude
2003 of Major Radovich in this case, and that we are vitally interested in him as a witness. We may even see fit to call him as a witness in this case, and for that purpose I want to know and I want the jury to know and be informed as to anything that locks the Major in a vise by taking a statement from him that affects our right to produce free and unrestrained all the evidence in this case from the witnesses who know best to the jury, and therefore I want the jury to know under what circumstances the original statement was taken.

The Court: But on this proposition, assuming that the statement has been admitted solely for consideration in the case against Radovich, then why have you a right to cross-examine him on that?

2004 Mr. Keenan: Because I think, your Honor, that the jury is going to consider what is stated in that confession regardless, and that the least we could do in attempting to deal with the situation practically is to let the jury know the circumstances under which it was received.

I assume that all these questions can be asked by the defendant Radovich's counsel, and I know that your

Honor is raising the point that technically, since that evidence is not admissible against or not to be considered in deciding the guilt or innocence of the two defendants Bayer, therefore I have not any right to bring out before the jury the circumstances under which it was obtained, and from a legalistic viewpoint, your Honor, if we were engaged in charting out some mathematical formula, and we had robots, with twelve or fourteen of them on the jury, there might be a good deal to that position. But I say to your Honor, and I maintain the position and I intend to pursue it to the highest authority, that there comes a time when asking the jury to do a useless and futile thing is an abuse 2006
of judicial process, with great respect to this Court that I know he would be following certain precedents in so doing, but I intend to leave no stone unturned to put before reviewing authorities, if the occasion arises, which I hope it never will, to examine into the circumstances, so that the reviewing court is going to see that we attempted and left no stone unturned to put before the jury all of the facts surrounding this so-called admission.

The Court: What have you to say on that particular proposition, Mr. McGohey?

Mr. McGohey: Your Honor, I am not addressing myself——

Mr. Keenan: Just one further word.

Mr. McGohey: Surely. 2007

Mr. Keenan: I just wanted to say one further word: I have a right to test the credibility of this witness. He is on the stand and he has testified also on matters pertaining to the defendants whom I represent. I want to cross-examine him about his credibility. When a man says that he went out to ward 15, under the facts and circumstances that have been ad-

duced in this court room, I think I have got a proper leg to stand on to ask this witness if he did not see anything there by way of a psychopathic ward. I want to raise the question of credibility.

The Court: All right, what have you to say, Mr. McGohey?

Mr. McGohey: I would like to address myself to the objection I made to the testimony, which was not precisely the same ground that your Honor picked up.

The Court: Yes, it is quite different.

Mr. McGohey: It is an entirely different ground. Let us assume for the sake of argument, or let us go back a moment. The point that I make is, if it be the right of Mr. Keenan to show these circumstances under which the September statement was made, if for whatever effect they might have on the March statement that is now in evidence, I submit that Mr. Keenan has to do that in his own case. I submit that he cannot do that under the guise of cross-examining this witness here and then produce, as he probably will, whatever witnesses he can to contradict what this witness says on the stand. He is going into matter which is entirely new. None of this was adverted to or the direct examination at all, and it seems to me that there is nothing strange about counsel making a witness his own on cross-examination if he goes into new matter. It may very well be that your Honor will say that he is entitled to show all the circumstances of the September statement, but I raise the point that it should be done in the orderly way, with his own responsibility for the witness by whom he intends to show those facts and circumstances and not this witness.

The Court: What have you got to say about the other proposition?

Mr. McGohey: Now, on the question of the right of the counsel for the defendants Bayer, I claim that he has no right whatever to cross-examine this witness under the instruction which your Honor gave to the jury at the time the statement was admitted. Your Honor clearly limited that, and that of course is only a reinforcement of the rulings which your Honor has given throughout this trial, that wherever a statement of a defendant was admitted, that the jury was to consider it only in its consideration of the case against that defendant.

Under that very clear limitation which your Honor gave just a few minutes ago, I maintain that there is 2012
no right on behalf of either Samuel or Elias Bayer for their counsel to cross-examine on that statement.

Mr. Keenan raises this question about what some court in the future may do about statements admitted under these circumstances, but your Honor is satisfied, and I am, that under the authorities as they stand today, the ruling of the Court is correct, that where the statement is admitted under a proper instruction that the prejudice that may come from it is not a fatal prejudice in any trial of this kind, and I maintain that there is no right on Mr. Keenan's part as counsel for these two defendants to cross-examine along these lines.

Mr. Keenan: I would say to your Honor that I 2013
think it would be logical that I ought here to pursue this line of inquiry of this witness or not be permitted to interrogate him at all at this time.

The Court: Do you wish to be heard further on it?

Mr. Keenan: No, that is all, your Honor.

The Court: Well, with a personal reluctance, but being satisfied of the legal correctness, I am going to hold that you have no right to cross-examine this witness because his testimony does not refer or apply

to the defendants whom you represent. It is my understanding that you do not represent the defendant Radovich.

Mr. Keenan: No, your Honor. That is very clear, I do not represent him. He is very ably and capably represented by the distinguished former Judge Advocate General, General Ansell, and Mr. Robb.

The Court: I concur in the last part of your statement entirely. It is the ruling of the Court that the counsel for the defendants Bayer may not cross-examine upon the statement just introduced, and I take it that you wish to except.

2015 Mr. Keenan: Yes, your Honor. Thank you for the exception.

The Court: All right. Do you wish to be heard on this matter?

Mr. Robb: No, your Honor.

The Court: All right. Bring the jury in.

(The following proceedings took place before the jury:)

The Court: All right, you may proceed, gentlemen.

*Cross-examination by Mr. Robb.*

Q. Mr. Flynn, who was present when you took the statement from Major Radovich on March 15 and 17, 1945? A. Major Radovich, and about half that time Special Agent
2016 McCabe.

Q. Coming to the March 15th interview, how long did that take? A. I would estimate it took maybe an hour and a half or two hours.

Q. By the way, that was in your office here in this building? A. That was on the 26th floor of this building.

Q. That was your office? A. That is right.

Q. The F.B.I. office? A. That is right.

Q. How long did the interview take on the 17th? A. I should estimate that it took possibly an hour or an hour and a half on the 17th to complete the statement.

Q. Who did most of the talking? A. I think that would be about equally divided between Major Radovich and myself.

Q. So probably the Major talked a couple of hours in all, is that right? A. No, I would not say so. There were pauses.

Q. There were what? A. There were pauses.

Q. Pauses? A. Yes.

Q. And you reduced his statement to a longhand statement of thirteen and a half pages, is that correct? A. That 2018
is right.

Q. By the way, Mr. Flynn, you had attached to that office plenty of young ladies who could take shorthand, did you not? A. Oh, yes.

Q. But you did not have Major Radovich's statement taken down stenographically, did you? A. No, I did not.

Q. Did you put in this longhand statement everything that Major Radovich said? A. No, I don't believe I put everything into it. I believe that I put most of what I considered important in there.

Q. When you left out something, did you leave it out purposely or inadvertently? A. Oh, I did not leave it out with any design.

Q. Yes. When you started to talk to him, did you tell him that any statement that he made might be used against 2019
him? A. Yes, sir.

Q. You said that it might be used against him in any criminal proceeding, did you not? A. Yes, sir.

Q. Did you put that in the written statement? A. I believe I put in that written statement, which I found out later on that it might be used, "in any criminal proceeding." I don't think the words "against him" are in there, though,

Q. Why didn't you put that in? A. I believe I got ahead of myself when I was writing.

Q. When did you discover that you had left that out? A. Well, I read it about two weeks ago, I believe. That was the first time that I discovered that.

Q. You did not leave that out, did you, Mr. Flynn, because you had assured Major Radovich that he was not going to be indicted? A. No, sir, I did not.

Q. You recognize, do you not, that there is a distinction between telling him that the statement could be used in a criminal proceeding and telling him that it could be used against him in a criminal proceeding? A. Oh, yes.

2021 Q. There is quite a difference, is there not? A. Yes, sir.

Q. You never had any discussion with the Major at that time as to whether or not he was going to be indicted? A. No, sir, I did not.

Q. Were you interviewing him at that time as a prospective defendant?

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

A. There was never any question at that time Major Radovich had cooperated, in my opinion, he was a Government witness.

Q. Was it not understood, Mr. Flynn, that since he had cooperated, as you put it, that he was not going to be made

2022 a defendant? A. I made no such understanding with him. Every time I spoke to Radovich, and I spoke to him actually as regards the taking of statements on only two occasions, I told him that anything he would say could be used against him.

Q. Yes, but now, Mr. Flynn, was it not understood between you and Major Radovich and Mr. Wallace, that he was not going to be indicated in this case?

Mr. McGohey: I submit that that has been answered, your Honor.

Mr. Robb: I submit that it has not, if your Honor please.

The Court: I will overrule the objection.

A. I don't know that there was any understanding on the matter, but I would say that I never did mention to him that he would be indicted.

Q. That he would not be? A. That he would be indicted.

Q. You did not expect him to be indicted, did you?

Mr. McGohey: I object to that, your Honor, what he expected. 2024

The Court: I will overrule the objection.

A. No, I did not.

Q. As a matter of fact, Mr. Flynn, he was not indicted in the first indictment which was returned against the Bayers, was he? A. No, sir.

Q. And he was not indicted because he cooperated, as you put it, isn't that right?

Mr. McGohey: I object to that, your Honor.

The Court: I will let him say if he knows.

A. I don't know why he was not indicted.

Q. You mentioned that you did not put in the statement that you wrote out in your handwriting everything told to you by Major Radovich. You discussed, did you not, Major Radovich's war record? A. Not at that occasion, as I recall it. We had discussed it on other occasions. 2025

Q. Yes. Were not some of the things in this statement matters which you discussed on previous occasions? A. Oh, yes.

Q. And you discussed how he had received the various decorations that he had, did you not? A. On other occasions.

Q. Yes. A. That is right.

Q. You discussed his exploits against the Japanese, did you not? A. Yes.

Q. But you did not put that in the statement, did you? A. I did not see that they entered into the materiality of the statement.

Q. That was a matter which might be quite helpful to the Major, was it not? A. What matter?

Q. The matter of his war record and his gallant war
2027 record? A. But it had no place in the statement.

Q. You thought that, did you not? A. I think anybody will admit that.

Q. So you put in the statement only those things which you thought had a place in it, is that right? A. I put in the statement the things which pertained to the case which was then under investigation.

Q. And you decided what pertained and what did not? A. I was conducting the interview.

Q. Was there any particular reason why you did not call in a reporter or a stenographer?

Mr. McGohey: I object to that.

Mr. Robb: May I finish.

Mr. McGohey: I am sorry; I thought you had fin-
2028 ished.

Q. Was there any particular reason why you did not call in a stenographer and have the statement taken down in shorthand? A. No.

Q. You knew that had been done in the case of the Bayers, did you not? A. Not in our office.

Q. It was done though, was it not? A. It was not done in our office.

Q. Won't you answer my question? A. It was done, but not in our office.

Q. Yes. Now, Mr. Flynn, at the time you took this statement from the Major on March 15th and on March 17th you had before you, did you not, the statements which you had taken from him in the hospital in September? A. The statement? Did you say statements?

Q. The statement. A. Yes.

Q. And before taking the statement from him in March you handed him to read the statement which you had taken in September, isn't that correct? A. I believe that is correct according to my recollection.

Q. And you read the statement, too, did you not? A. 2030
Yes, sir.

Q. Was there any substantial difference between the earlier statement and the one you took in March? A. Yes, there was at least one correction, I believe, on the name of the uniform company, and the one which I took in March I would say went into more detail.

Q. That went into more detail? A. That is right.

Q. The one you took in March? A. Yes.

Q. How long was the one you took in September; how many pages? A. I would say it was about six pages.

Q. Was that also written out in longhand? A. Yes.

Q. In your handwriting? A. Yes.

Q. Why did you think you had to take another statement in March? A. Well, that was just my personal opinion; that Major Radovich had told me many more in- 2031
stances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement.

Q. The two statements, though, were basically the same, were they not? A. Basically, roughly, yes.

Q. Now, where was the Major when you took that statement of September? A. At Santini.

Q. What ward was he in? A. I just stated that I don't recall the number of the ward. I know that he was in a private room in one of the corridors of Santini Hospital.

Q. How did you get in to see him? A. I was taken there by Lieut.-Col. Miller.

Q. Who was he? A. Lieut.-Col. Miller was then the assistant, I believe. He was the Assistant Judge Advocate of the First Fighter Command.

Q. That was the command to which Major Radovich was attached? A. Yes, sir.

Q. When you went into that ward did you have to go through a locked gate or not? A. Well, I don't recall going through a locked gate. As I said before, I followed
2033 Lieut.-Col. Miller and possibly Special Agent Brown. I don't know whether I was second or whether he was second, but I don't recall the gate being locked.

Q. Would you say that it was not a locked gate that you had to go through?

Mr. McGohey: If your Honor please, I object to this line of questioning on the same ground that I interposed before.

The Court: Overruled.

Mr. McGohey: That it is improper cross-examination.

The Court: I will overrule the objection. Go ahead. I think you answered the question.

2034 The Witness: No, I had not completed it. I would not say categorically that there was not a gate there. I would say that I do not believe that if there were a gate there that it had to be opened with a key to let me in.

Q. You don't remember that? A. I don't remember that.

Q. What kind of a room was Major Radovich in? A. He was in a small room.

Q. About how big was it? A. I have given my estimate on that here, about 10-foot square.

Q. And what kind of furniture did it have in it? A. Well, as I recall it, he had a bed, a table, and I think he had two chairs.

Q. Straight backed chairs? A. I couldn't recall that.

Q. There was quite a bit of vacant space in the room, was there not? A. Well, I don't recall that there was any void noticeable.

Q. That furniture took up the whole room, do you mean? A. No, I don't say it took up the whole room.

Q. Don't you know that room is about nine by six? A. I have not seen the room——

2036

Q. It was really a cell? A. I have not seen the room in over a year now. There was no particular reason for me noticing the room. I wasn't examining the room.

Q. You were examining Major Radovich, were you not? A. I was interviewing Major Radovich.

Q. Were you interviewing him as a prospective defendant? A. At that time I did not know.

Q. Did you have any discussion with him then as to whether or not he was to be indicted in a civil court? A. No, sir.

Q. That question did not come up? A. No, sir.

Q. Do you recall any conversation at the time you saw him in that room at Santini Hospital about his decorations? A. I don't recall any conversation. I recall that somebody brought a letter in to him concerning his decorations, and what was in the letter I don't know. I recall that Radovich told me that they wanted him to take the decorations off.

2037

Q. Who had told him? A. I don't know.

Q. It was not you? A. It certainly was not me.

Q. I do not mean to imply that it was. I merely want to have the record show that. At that time, Mr. Flynn, was there any hesitancy on the part of Major Radovich in giv-

ing you a statement? A. I recall no hesitancy on his part whatsoever.

Q. How long had you been there before you started to take this statement from him? A. Well, I couldn't recall that.

Q. Give us your estimate. A. My estimate, which must necessarily be rough, would probably be fifteen or twenty minutes.

Q. What were you talking about before you started to take the statement? A. The case.

Q. What were you saying about it? A. Well, I would say that I was listening to Major Radovich's story before
2039 attempting to reduce it a statement.

Q. He started to give you his story as soon as you came in there? A. Within a short time thereafter.

Q. Within how long? A. I could not estimate that.

Q. Don't you remember him asking you whether or not you were interested in prosecuting the civilians in the case or whether you were after the military personnel? A. No, I don't recall that.

Q. Would you say that didn't take place? A. I would say that I don't recall.

Q. Would you say that did not take place? A. I would say I would recall it if it had taken place.

Q. You do not recall about the gate either, do you, Mr. Flynn? A. No, sir, I do not.

Q. You don't recall that? A. I don't think the gate was
2040 in the statement.

Q. By the way, do you have that statement that you took from Major Radovich in the hospital? A. No, sir.

Q. Where is it? A. I think Mr. McGohey has that statement.

Mr. Robb: May I see it, Mr. McGohey? That is the statement I asked Mr. McGohey to give me the other day and I did not get it from him.

Mr. McGohey: I object to all this speech before the jury. The statement has not been offered by the Government. All this examination goes to the statement of March 19th or March 15th, which is in evidence, and I again make my objection to the line of examination.

The Court: What is your position?

Mr. Robb: Well, if the Court pleases, I think it is perfectly obvious, if the two statements are tied up together——

The Court: I am merely asking you what your position is and what you are asking for?

Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it 2042
the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception.

The Court: Yes.

2043

Q. Mr. Flynn, let me go back for a moment to the ward in the hospital. Were there any bars or heavy grates on the windows? A. I don't recall any.

Q. Would you say there weren't any? A. I would not say there were and I would not say there were not.

Q. Did you see any screens on the windows? A. My recollection is that there was a screen there.

Q. What kind of a screen? A. An ordinary screen.

Q. An ordinary screen to keep out the bugs, you mean? A. I assume so.

Q. And you remember that but you don't remember any heavy mesh over that? A. I don't recall that.

Q. Let me ask you specifically. Do you remember any heavy grille over the door to go into this ward? A. No. The door? Over the door?

Q. Over the door to the ward. A. It seems to me that there was some sort of a gate or a door to the ward. What kind it was I don't recall.

Q. Mr. Flynn, your powers of observation are reason-
2045 ably good, aren't they? A. I think they are.

Q. You have been trained to observe, as a matter of fact, have you not? A. That is right.

Q. But your testimony is that you cannot recall what kind of a gate there was on that ward, is that right? A. There was no reason for my noticing it.

Q. Were you interested, Mr. Flynn, whether or not Major Radovich at that time was in confinement? A. Well, it never entered my mind at the moment that he might be in confinement or not.

Q. Were you interested in whether or not he was?

Mr. McGohey: I object to that, your Honor.

2046 A. I am afraid I did not notice.

Mr. McGohey: That is immaterial.

The Court: He has answered it.

Q. Now, Mr. Flynn, I want to ask you a general question. Did you ever have any conversation or make any statement to Major Radovich at any time to the effect that you, meaning the Government, the prosecution, were not

interested in trying him in this case? A. No, I do not recall ever telling him that we were not interested in trying him.

Q. Do you recall saying to Major Radovich that you were not interested in prosecuting him but you wanted to get those Jews, meaning the Bayers? A. No, I certainly did not say that.

Q. You never said that. Are you sure about that? A. I am.

Q. Your testimony is you don't recall saying anything about whether or not you were interested in trying Major Radovich? A. That is right,

Q. Pardon? A. I said that was right. 2048

Mr. Robb: That is all. Thank you.

The Court: Redirect?

Mr. McGohey: No further questions.

The Court: All right. You may stand down. Call your next witness.

(Witness excused.)

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Mr. McGohey: If your Honor please, I should like at this time to read to the jury the statements. I would like to read first the statement of Samuel Bayer and then Elias Bayer, and then the statement of Radovich.

The Court: All right, sir. 2049

Mr. Wallace: This is Exhibit——

Mr. Keenan: It is not necessary to repeat the objection that we have?

The Court: Oh, no, sir. You both stated your objection, taking an exception. This is simply the actual reading of what has been admitted.

All right, sir, proceed.

Mr. Wallace: This is Exhibit No. 8, your Honor. The statement of Samuel Bayer.

(Mr. Wallace commenced to read Government's Exhibit 8 to the jury, during the course of which the following occurred):

Mr. Keenan: May the record show that is one continual statement without interruption of questions and answers?

The Court: Yes.

Mr. Wallace (reading): "Q. That is the last time you have seen or heard of Radovich?"

Mr. Keenan: That is, questions by Mr. Wallace, I believe; isn't it?

2051 Mr. Wallace: Yes.

Mr. Keenan: Thank you.

(Mr. Wallace resumed the reading of the Exhibit 8 to the jury down to and including the following question and answer: "Q. How old is Justin? A. I don't know, sir.")

Mr. Keenan: I ask, in the interest of the economy of time, the questions with reference to these brothers, unless they are material to this lawsuit, should not encumber this record. If the Government contends they are material, very well.

The Court: Do you object to omitting it?

Mr. McGohey: Sir?

The Court: I ask if you object to omitting that part?

Mr. McGohey: No, I don't think so, but as I recall it

2052 your Honor suggested that the attorneys point out what they thought——

The Court: If there is no occasion to read it, I don't see——

Mr. McGohey: Have you any idea how far it goes, Mr. Keenan, that you think ought to be left out?

Mr. Keenan: I may say there is a good deal here that hasn't anything to do with what we are talking about.

The Court: Let us take a ten-minute recess, ladies and gentlemen. See if you can agree upon as much as you can that can be eliminated.

(Short recess.)

Mr. Keenan: Your Honor, this entire statement is in evidence by the Court's ruling.

The Court: That is correct.

Mr. Keenan: And there is only a question or two that do not follow along in continuity. I made an error in that. So there is no particular point in interrupting its proceeding at this time. I beg your Honor's pardon. There is nothing left out at all.

(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following answer: "A. As far as I live, the uniforms were returned anyway.") 2054

Mr. Keenan: That must mean "as far as I know," if it makes any sense. Do you consent to that?

Mr. McGohey: Yes.

Mr. Keenan: That would read then——

Mr. Wallace: "As far as I know, the uniforms were returned anyway."

(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "Mr. Keenan stated that he has advised Mr. Bayer for the time being not to reply to that question.")

Mr. Keenan: I think the record will show the Government knows all about that. I don't think it is material to this lawsuit. If it is, I am perfectly willing to have it all go in. 2055

Mr. McGohey: I make no point on that, your Honor, and it might just as well be left out.

Mr. Keenan: I haven't any objection to it.

Mr. McGohey: I understand that, but it has no bearing on this at all.

The Court: Leave it out and read on.

(Mr. Wallace continued reading the exhibit, beginning with the question "Where did you get the $5,000," down to the following: "Q. Did you ever meet any other officers at Middletown besides Colonel Clarke? A. No, sir.")

Mr. McGohey: Will your Honor excuse me for just a minute? I just want to see the rest of these.

All right. I think there is a page there, your Honor, that we might leave out. The Government does not claim that they are very material.

Mr. Keenan: At this point, your Honor, in view of the suggestion of moving to strike out parts that are not material, I think it is entirely proper at this time to ask the
2057 Government if it will state what officers it refers to in this indictment besides Radovich that these defendants conspired with to defraud the Government by influencing their judgment, by failing to have it free from impartiality and in direction and the like. I think that is a fair time to ask this, your Honor. Otherwise I won't know how to state what suggestions there may be about striking out evidence that your Honor has so kindly suggested we do with reference to this statement introduced by the prosecution.

Mr. McGohey: Your Honor, I will withdraw that suggestion that we leave out any part of the statement your Honor has admitted it all in evidence. We will go ahead and read it. As far as the declaration demanded by counsel, I don't think I have to make it and I decline to make it.

2058 Mr. Keenan: Regardless of any withdrawal or otherwise of Mr. McGohey, I suggest to your Honor that it is the timely inquiry of defense counsel, if the suggestion of your Honor that we move to strike out anything in these statements is to mean anything, that we ought to be apprised at this time what officers the Government contends these three so-called conspirators attempted to influence, whose judgment they attempted to influence, because I won't be able to properly move without having that information.

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And with great respect I point out to your Honor that the indictment uses just the word "officers". I have listened attentively to find out which ones they meant, and each one as they appeared on the witness stand, offered by the Government as witnesses I have asked them if any effort was made to influence their judgment and I have the reply —a negative reply from each one. I don't know how near the Government is to the termination of its case, but I do say there is a time when we should be advised what officers the Government claims we attempted to subvert, whose judgment we attempted to subvert.

The Court: The motion is overruled.

Mr. Keenan: I note an exception.

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(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "Q. On one occasion Radovich phoned Mitchel Field and promised he would bring him a flying jacket.")

Mr. Keenan: I ask that that be stricken out as not following the sequence; it doesn't make any sense. Perhaps we could have an agreement on it.

The Court: See if there can be any agreement.

Mr. McGohey: We will read it the way it is.

The Court: All right, read it just as it is.

Mr. McGohey: We will repeat it.

The Court: Read what you have.

(Mr Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "A My brother Eli was not there——")

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Mr. Keenan: "was there."

Mr. Wallace: I think the stenographer corrected that.

Mr. McGohey: I think the stenographer corrected that and said that was one of the corrections she wanted to make in her notes, to read "was not there." The record will show that.

Mr. Keenan: Obviously if it was "Eli was there" it is a mistake, in any event.

Mr. Wallace: She stated that her notes read "he was not there".

Mr. Keenan: It is an obvious error with the next question.

The Court: All right.

(Mr. Wallace continued reading Government's Exhibit 8.)

The Court: That completes Samuel Bayer's statement, does it?

Mr. Wallace: It does, your Honor.

The Court: I think we had better stop here.

Ladies and gentlemen of the jury, I am going to excuse you until 10.30 tomorrow morning.

2063 I would like to see counsel here just for a moment.

(The jury retired from the court room.)

(Adjourned to October 16, 1945, at 10.30 A. M.)

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New York, October 16, 1945, 10.30 A. M.

TRIAL RESUMED.

The Court: You may proceed, gentlemen?

Mr. McGohey: The Government is about to read Exhibit 19 to the jury, your Honor.

The Court: Go ahead.

2064 (Mr. Wallace proceeded to read Government's Exhibit 19, statement of Elias Bayer, to the jury, down to the following answer: "Roeser and Vidal came in, I believe the following day, and I asked my brother if he would mind if I took them up to my brother so they could buy at wholesale price.")

Mr. Keenan: It is obviously a stenographic error in this record now, and I think it will be so conceded.

Mr. Wallace: I think it should be "brother-in-law" at one point.

Mr. Keenan: That is right.

Mr. Wallace: I will reread that sentence.

Mr. Keenan: It should be "my brother's brother-in-law", because it is not Eljas Bayer's "brother".

Mr. Wallace (reading): "Roeser and Vidal came in I believe the following day and I asked my brother if he would mind if I took him up to my brother's brother-in-law so they could buy at wholesale price.")

(Mr. Wallace continued reading the exhibit down to the following: "Did you speak to anybody up there? A. I don't remember if it was Mr. Phil Buss or Harold Buss.")

Mr. Keenan: That, the record ought to show, is Busch instead of Buss. Another stenographic error. 2066

Mr. Wallace: I don't concede that that is a stenographic error or not. We have just referred to I. Buss Uniform Company, and I don't know whether the answer was made "Phil Buss" or "Phil Busch," or Harold Buss" or "Harold Busch." I make no such concession.

Mr. Keenan: Is it the claim of the Government that that answer was "Harold Buss" or "Philip Buss," because if it is, I want to put some testimony on about it. It is obvious that there are no such individuals.

Mr. McGohey: We will concede that it is Phil Busch and Harold Busch being referred to, the two members of the firm.

Mr. Keenan: And that is a stenographic error in the record.

Mr. McGohey: I will concede that the correct answer is Busch, your Honor. 2067

The Court: All right, go ahead.

(Mr. Wallace continued reading Government's Exhibit 19, down to the following: "A * * * and I took him up and introduced him to the Busses.")

Mr. Wallace: I will concede that should be "Busses".

Mr. Keenan: You can have the Busses this time, but we have the Busches the other one.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following: "A * * * I walked out with Solomon——".

Mr. Keenan: I think the record ought to show that he walked out with "Miss Solomon". I think that is a stenographic error, too, in forming the word. There is no "Solomon" there. It is "Miss Solomon".

Mr. McGohey: I take it that Mr. Wallace—I haven't seen this, but I am sure Mr. Wallace is reading what is in there. The testimony of the witnesses is that these are true and correct transcripts of their statements. And the accuracy was conceded. Now, this interpretation of whether it is
2069 Miss Solomon or Solomon, that is what the transcript says, "Solomon". It doesn't make any difference.

The Court: I want the transcript read as it is.

Mr. Keenan: Your Honor, may I have the record corrected? I have been misquoted unwittingly by Mr. McGohey. I did not concede the accuracy of that record. I conceded that if these little girls continued to come on the witness stand they would say that they had to the best of their ability accurately transcribed the record. But there are obvious mistakes in that record, and I never conceded them.

The Court: That is a matter for argument. Is it my understanding that your contention right here is that Solomon is actually Miss Solomon, a secretary?

Mr. Keenan: That is correct.

2070 The Court: That is my impression, that she is the only Solomon concerned. However, in making the statement it is entirely possible that Mr. Bayer referred to her as "Solomon". I don't know whether that is what he said or not, but the stenographer says it is.

Mr. Keenan: Might I state, I don't think it is serious because there are points here where we have been able to get together, but if it is necessary I will have of course the right to bring this girl on and ask her to show me her notes.

But I don't want any mistake before the jury, and I think it is so clear that it is Miss Solomon that it ought to be so read. But I am more interested in this, your Honor, that the record will show no such statement as that made by Mr. Wallace to Mr. McGohey, that I conceded the accuracy of this record.

The Court: I agree with you that that statement was unwittingly made. As I recall it, you conceded that the stenographer would testify that she accurately transcribed the record.

Mr. Keenan: I have had a lot of stenographess in my office and I never found one of them that could ever go along for a score of pages——

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The Court: You are making an argument now, Mr. Keenan, which is not proper.

Mr. Keenan: Well, perhaps.

The Court: I want the transcript read as it is. If you wish to make any concession——

Mr. Keenan: We will ask the right to correct it afterwards.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following: "A * * * I explained that my mother was very worried about the boy.")

Mr. Keenan: Is that "mother"?

Mr. Wallace: I assume it should be "brother".

Mr. Keenan: Because his mother is dead.

(Mr. Wallace continues reading Government's Exhibit 19 down to the following: "Q. Did Rosa Vidal ever pay for the use of the apartment?")

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Mr. Keenan: Is it claimed that there is a Rosa Vidal, or is that a stenographic error?

The Court: Read the statement as it is.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following:

"Q. Is that your first marriage? A. No.")

Mr. Keenan: I object to that unless there is some purpose in bringing out the fact.

Mr. Wallace: I have no objection to omitting it.

Mr. Keenan: It is only a question, your Honor, and then they will have it all.

Mr. Wallace: I am omitting certain parts of the exhibit, your Honor.

Mr. Keenan: I say, let us read it all now.

Mr. Wallace: I can read what part of the exhibit I want, if Mr. Keenan wants to read any part of it, he can do so.

Mr. Keenan: All I want to say is, we don't object to it.

(Mr. Wallace continues reading Exhibit 19 down to the
2075 following: "By G. J. F."——

Mr. Keenan: Can we have that person identified?

Mr. Wallace: Gerald J. Flynn.

(Mr. Wallace concludes with the reading of Exhibit 19.)

Mr. McGohey: If your Honor please, I would like to give Mr. Wallace a rest, and I will read the Radovich statement.

Mr. Robb: If the Court please, I notice there are a number of words in that statement that are misspelled. I wonder if they could be read to the jury as spelled?

Mr. McGohey: Which statement are you talking about?

Mr. Robb: The one you are about to read.

Mr. McGohey: Exhibit 25.

Mr. Robb: Yes. We could simply pass the statement to the jury, it might be easier than to read it.

2076 Mr. McGohey (reading): The statement is headed, "March 15, 1945, New York, N. Y. I, Major Walter V. Radovich, Air Corps, Serial No. 0416891, make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn, who have identified themselves to me and whom I know to be special agents of the Federal Bureau of Investigation."

Mr. Keenan: May I ask the jury to be instructed at this time that nothing that is read in this statement is in any

manner or fashion to be considered by them in any way reflecting upon the guilt or innocence of the defendants Samuel and Elias Bayer? 2077

The Court: I have already so stated to the jury and I propose to state again when the time comes to charge, I don't think it is necessary to repeat it now.

Go ahead.

Mr. Keenan: I didn't hear your Honor.

The Court: What is that?

Mr. Keenan: I didn't hear you.

The Court: I said I have already so charged the jury and I expect to charge them again when the time comes to charge them to that effect. I don't think it is necessary to repeat it every time reference is made to it. Go ahead. 2078

(Mr. McGohey continued and concluded with the reading of Exhibit 25 to the jury.)

The Court: Has the Government further evidence?

Mr. McGohey: Your Honor, on that question, might we approach the bench with counsel? I have one witness that I have been trying to get since the beginning of the trial. He is in the service. He was overseas. I was informed last night that he would be here some time today. I sent telegrams and made telephone calls urging that he be here before noontime but I have not heard that he was here yet.

Mr. Keenan: Who is it, Mr. McGohey? Did you tell?

Mr. McGohey: No, I did not. I thought we might go to the bench, but I see no reason not to state it in open court. I would like to have the witness testify very much. 2079

(Short recess.)

(Recess until 2:00 p. m.)

AFTERNOON SESSION.

The Court: Are you ready to proceed.

Mr. McGohey: Yes, your Honor. The witness that I had hoped would be here has not yet arrived, and I have no word from the Army authorities as to where he is, except that he is on the way. So in conformance with my statement to your Honor before recess, as well as yesterday, the Government will now rest.

The Court: All right, the Government rests.

Are you gentlemen ready to proceed?

Mr. Keenan: Your Honor, we have some motions to interpose.

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The Court: All right, proceed.

Mr. Ansell: If your Honor pleases, at this time at the close of the Government's case I wish to renew defendant Radovich's plea in bar on the ground if the prosecution has proved anything here, assuming that it has proved something, it is either a conspiracy to bribe or bribery. Without entering into any argument, because I could add nothing to that, I would say to your Honor that it is my view that such was the charge before the court martial of which this accused was convicted.

The Court: All right, sir. I would take it that the effect of what you said is a motion for a directed verdict by reason of the plea in bar.

Mr. Ansell: If it is not technically that, your Honor, as

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to which I have some doubt, I will couple with it a motion for a directed verdict at this time. That, it seems to me, would be the proper procedure covering all the rights which I hope to save here.

The Court: I should think that would be the proper procedure.

Mr. Ansell: I thought myself, without knowing that I had better protect my rights here by making a formal renewal of the plea in bar, but I think your Honor's sugges-

tion is quite correct, and I couple with it, therefore, a motion for a directed verdict. Your Honor has heard all the evidence and he is familiar with this case and I do not care to consume time in the argument.

The Court: All right. The motion will be overruled and an exception may be noted.

Mr. Ansell: Thank you.

Mr. Robb: If the Court please, there are certain parts of the testimony to which we would like at this time to invite your Honor's attention.

The Court: All right.

Mr. Robb: And which we at this time move your Honor to strike as to the defendant Radovich. I do not have a 2084
transcript. We have not had one. However, I think I can indicate what that is from my notes.

The first portion of the testimony which I see here is the testimony of the witness, Major Morris H. Saffron, concerning a meeting which he had with Samuel Bayer and one Busch in December, 1942. He testified, as I recall, that they came down to the induction center where he was stationed, and I believe he also testified that he had luncheon with Samuel Bayer on one or more occasions. That all occurred late in 1942. The evidence has shown, if it has shown anything, that that was long prior to the time when the defendant Samuel Bayer, or any of the Bayers, knew the defendant Radovich.

We therefore think that should be stricken as to the defendant Radovich. 2085

Does your Honor wish me to take all these portions of the testimony at once and rule on them together?

The Court: Yes, I think so.

Mr. Robb: The next portion of the testimony, if the Court please, is the testimony of Harold Busch respecting a conversation which he said he had with Samuel Bayer in July or August, 1944. He testified that Samuel Bayer at that time asked him to change the records respecting who paid for certain uniforms, and he did so thereafter.

We move your Honor to strike that testimony as against the defendant Radovich upon the ground that if there had been a conspiracy, the evidence shows that there was not any at that time.

The next piece of testimony, if the Court please, is that of the witness, Captain Kogan, who testified concerning going to the home of Samuel Bayer, as I recall it, in the summer of 1942. He testified that Samuel Bayer asked him if his son would be eligible for enrollment in the air corps and whether he could get assigned to Mitchel Field. That of course, took place, if it took place at all, long before any conspiracy could be claimed to have been entered into by
2087 the defendant Radovich.

Again the same witness, Captain Kogan, testified that in December, 1942, Samuel Bayer called him and asked him if he, the witness, knew that the enlistments were closing at the end of that month, and Samuel Bayer asked him what happened to people when they were drafted, and the witness testified that he told Samuel Bayer that people who were drafted were assigned to the infantry, and Samuel Bayer responded that he wanted his boy in the Air Corps.

That incident, if the Court please, took place long before this defendant Radovich had been shown to have had anything whatever to do with the Bayers, and long before any conspiracy, if there was any, could have been entered into by this defendant Radovich.

2088 Again the same witness, Captain Kogan, testified that in March, 1943, Samuel Bayer told him that Colonel Jacobson had promised Samuel Bayer that he would get, I believe he said, a good assignment for Samuel Bayer's boy for about a year. That, if the Court please, if it took place at all, took place long before this defendant Radovich could be said to have joined any conspiracy.

We move the Court to strike all that testimony which I have tried to summarize or to indicate to your Honor upon

the ground that if the conversations and instances narrated ever took place, they took place long before it could be argued that the defendant Radovich ever joined in a conspiracy. And there is no evidence that if he afterwards joined any conspiracy he ever ratified or even knew about these statements and the things which had been done.

The Court: I do not understand that in a conspiracy case every bit of testimony has got to be related to every defendant. I think the testimony is admissible generally. I overrule your motion.

Mr. Robb: May we have an exception, if your Honor please?

The Court: You may. 2090

Mr. Keenan: Your Honor, in asking the Court to grant a motion for the jury to be instructed to return a verdict for the defendants Samuel and Elias Bayer, I wish to specifically point out to the Court our objection, which we think is seasonably made at some time during the prosecution's case, that we think that particularly important to make at the close, and that is: that the indictment does not charge an offense against the United States, and specifically that this purports to be a charge of conspiracy in violation of Title 18, Section 88, and that part of Section 88 which we may refer to I believe intelligently as two-pronged, the second portion of it, the first part of it being conspiracy to commit an offense against the United States and the second part conspiracy to defraud the United States in any manner or for any purpose. 2091

We point out briefly but with great respect to your Honor, that we believe this is a novel theory in prosecution where Section 88 of Title 18 is adverted to, where reliance for the subject matter of the crime is the bare use of the word "defraud" without reference to any other section of the United States Code. For example, in all other prosecutions that we know of, where we have been able to examine the authorities, the indictment specifies in one form or an-

other that even if Section 88 is adverted to and even if there is a departure from the usual course of specifying the section of the Code of the offenses against the United States by section number, such as, for example, in some of the preceding indictments, Section 91, that even when reliance is made upon defrauding the United States there is of necessity reference to some statute of the United States which describes what is meant by "fraud".

And we say to your Honor that we believe upon reflection it will become very clear that if this indictment be sustained in this manner and fashion as alleged in this case, it just means that anything which would come within the definition of the word "defraud", whatever it might be, and 2093 two people agreed or confederated to perform, to do that thing, whatever it would be, and a single act were taken in pursuance thereof, we would have as claimed by the Government in this case, as they must claim, a violation of Section 88 of the second what I might call prongs for want of a better expression.

Now, your Honor, reflection on that will show that here is a felony with a very substantial criminal sanction attached thereto, where citizens of the United States could go about with so many opportunities and occasions to run afoul of the law, that we would get to the most absurd, to say nothing of cruel, situations imaginable, resting entirely upon the good sense of the administrative or executive branches, in the first instance, of the Government. For ex- 2094 ample, under the statute, in an indictment it is alleged that merely speaking to the elevator girl on the way up purposely to get her to slow up an elevator to keep a lawyer from arriving on time before your Honor in this case, and coupled with a stick of chewing gum, would amount to a conspiracy to defraud the United States, punishable with a long term in the penitentiary.

The point I am making is this, your Honor, that to sustain the indictment in this form would be to establish a

pattern and type of crime where there would be no fabric, no clear-cut pattern that any citizen could ever know or anyone else ever know when he was within or without the law. And with great respect we submit to your Honor that the Congress of the United States never intended to create a mass, a class of crimes where the only limitation would be the limit to the fantastic, if he saw fit, notions of the prosecutor with the acquiescence of the grand jury.

So that, succinctly stated, or as clearly as we can, we think that there is a failure to state an offense without the entire conspiracy relating to some better defined offense or area of offense than the particular term "defraud", especially when the statement is made in the statute "Defraud the United States in any manner or for any purpose." 2096 We do not believe, your Honor, that it ever was contemplated or could have been in good sense by the Congress of the United States that the broad field of conspiracy, uniting with the broad field of fraud, with no definition of "fraud" excepting that found presumably in Webster's Dictionary or the Century Dictionary or that had come into usage through practice—that is the only way where a man can find now whether he is running afoul of the criminal statutes—we do not believe that it was ever intended that that field of crime should be established in the United States.

And so on that ground, with great respect, we ask your Honor to consider whether to direct a verdict on the ground that the statute is so vague and so uncertain, that the indictment is so vague and so uncertain that it contravenes the requirements in that respect. 2097

Now, secondly, we ask your Honor to consider our objection that there has been a failure dehors or aliunde, and let us call it independently of the so-called admissions —or admissions—to establish that which the law requires by way of data on the corpus delicti, which in this instance we claim, your Honor, is the conspiracy itself.

I think in a previous argument to your Honor I erroneously stated my position, and in a re-examination of the Forte case and allied cases, it became very clear that if whatever quantum of proof is necessary for the Government to meet to establish the corpus delicti, that the corpus delicti is more than the agreement; it would be enough, your Honor, we claim in this case to require a directed verdict for the defendants Bayer if the corpus delicti were synonymous with the agreement. But very specially, in cases of conspiracy, we contend that that is the one crime where there is an exception to the rule, and the corpus delicti in a charge of conspiracy is the conspiracy itself,
2099 and of course every part of it.

Therefore, we do not know, with great respect, whether your Honor is following the Forte case or whether your Honor is following the Kertess case, if there be a difference in the two. And, very candidly, the Kertess case is in the Second Circuit. I know that it is familiar to counsel for the Government because the distinguished Assistant United States Attorney Mr. Wallace was counsel in that case, if my memory serves me correctly, or of counsel.

And there, your Honor, we seek at this time, if there is any way we can do it on such highly important matters as those touching admissions or confessions; and I think it can be conceded that we are on fundamental ground for the reservation of the rights of the defendants in Anglo-Saxon courts, in contradistinction to those of foreign nations in
2100 that regard—it is well settled in our court that we do have certain safeguards that are foreign to the ideas of people that live in other groups, other parts of the world; but here we have some rules that are laid down; we have the requirements with reference to the corpus delicti——.

The Court: You express a doubt as to which case I was following. I am in equal doubt and I would be grateful if you would elucidate a little on the two cases and the distinction, differentiation between the two.

Mr. Keenan: I think your Honor has posed a pretty good question to me, but let me state first what I believe the Forte case, written by the distinguished Justice Stevens, who happened to be an associate of mine in the Department, also a classmate in law school, so I am quite familiar with his views and those expressed—the Forte case is plain and clear authority for this. First, that if a confession or admission—confession or admission—is to be considered there must be some evidence aliunde of the corpus delicti. Now the Forte case follows the Eighth Circuit—there are two chief cases there, they are grouped together—and the Forte case claims that it states the overwhelming weight of authority in this country on that subject. 2102 It holds that the corpus delicti is not alone the agreement but is the conspiracy, with the anomaly that I have mentioned before. And it holds, therefore, that before a confession can be considered adequate, the fact determining body must find in outside evidence substantial evidence of the conspiracy. And "substantial evidence" the Forte case says, is the conspiracy or the corpus delicti, which it identifies, one or the other, and every part of it. That is the language of the Forte case. There is no blinking. The Forte case is as clear as a bell.

So that under the Forte case, and it doesn't make much difference, your Honor, in my opinion, whether there would be a independent ascertainment of the aliunde quantum before it was sent to the jury or not; it would still be the duty, with great respect to the court, to make its finding 2103 to be the determination of the Government's case. That must be there. And the Court itself, not being desirous to evade the duty, never could anyway because it had a plain function it has to perform.

Now it gets down to this, that before the Bayers can be found guilty by the use of these statements that they made, if they be guilty admissions or confessions, and I am not going to differentiate for the moment between the two,

whatever they are, whatever they may be—that there must be proof offered of every single part of this conspiracy. And, your Honor, it must be the conspiracy that is alleged in this indictment. It can't be any other conspiracy and it must be the whole of it. They can't divide it into two parts or it can't be the more particulative; it must be that this was the whole thing, because that is what the authority says—the corpus delicti is the whole entire conspiracy and it should be from—from September 1, 1942, until July 15, 1945; and the Forte case says that that outside any admissions or confessions there must be evidence supporting every single essential element of that entire conspiracy,
2105 every part of it as alleged in the indictment.

The Court: Do you construe that "every part" means that the Government has to prove everything complained of in the indictment, the dates and everything else?

Mr. Keenan: Exactly, your Honor. That is the burden the Government undertook and that is the conspiracy that it has described.

The Court: I do not believe the Forte case holds that, and I am not going to suppose——

Mr. Keenan: The Forte case—I say that point was not before the Forte case. That case was not before the Court on this precise question.

The Court: I do not believe the Court would have held the Government to as strict a requirement as that.

Mr. Keenan: I do not have the Forte case before me at
2106 the moment; but the language is very clear.

As your Honor will recall the language, every part of it—so that the Forte case is talking about the conspiracy alleged in the Forte case. It is not talking about any other.

Now, your Honor, I think that we have got to get to a point—getting a little bit ahead of our subject—that in fairness a defendant ought to be apprised of what the Government does claim the conspiracy was. And it is not sufficient merely to say it is a conspiracy to defraud. That

would be hideous. It must be some kind of a conspiracy to defraud, starting with a certain time and ending at another time. I do not see why the time of the beginning and the time of the ending does not identify the conspiracy.

I do not think the Government has any opposition to spreading itself all over the lot and then saying, "Well, if I can dig out any kind of a conspiracy from this proof that is offered, we are going to substitute that."

Nor do I think that the Government can just allege a certain date and ignore it entirely. But, however that may be, certainly we have a right at some time or other, your Honor, to be informed what is it that the Government does claim in this case is conspiracy. 2108

Now, I know that they might come back and say, "Well, they claim there was a conspiracy on the part of the two Bayers and Radovich.

Your Honor, they do not describe any other conspiracy between the two Bayers. They say there was a conspiracy between the two Bayers and Radovich. They might have alleged that there was an initial agreement between the two Bayers subsequently joined into by Radovich, but that is not what is alleged in this indictment. Not at all. They allege a conspiracy and an agreement between the two Bayers and Radovich.

Now, to come back to the law question, your Honor: Certainly, the Forte case says that whatever the conspiracy is that the Government is resting upon, and there must be some agreement, there has got to be some conspiracy. It 2109 must be defined in some manner; that some time the Government must say, "Well, we claim there were three in it, there were four in it, or five." I do not understand that the claim is any more than three individuals in this conspiracy.

And they say that it was a conspiracy to defraud the United States Government out of the fair and impartial services of officers.

Your Honor, some time or other in a court of justice we are entitled to have the United States Attorney tell us who the officers are that he claims that we were attempting to defraud. Or name them or describe them in some manner or other. And we have not had it or heard it yet in the indictment, unless it is all the officers.

Now, in any event, under the law of the Forte case, there must be substantial evidence aliunde of every essential part of the conspiracy. That is what the Forte case says. So, therefore, in this case there must be substantial evidence aliunde of some conspiracy which is reasonably to be interpreted, I hope, within the confines of the general
2111 language used in this indictment.

Now, I say to your Honor that I do not know that the Kertess case goes that distance. I think the Kertess case—I do not want to say and I have no right to interpret it—that the Kertess case says that we are differing from the Forte case, but Mr. Justice Frank——

The Court: In what particulars?

Mr. Keenan: I say—I am not making that claim that it so states, but the language of the Kertess case is that even if we were to follow the Forte case—that is the language of that decision, which leaves it delightfully indefinite as to whether they are following it or not, to say the least.

I am saying to your Honor that if we arrive at such an important point in matters of confessions and admissions, and I am not going to waste the time of this Court in
2112 urging the importance, that the law be clear with reference thereto, and that in this great United States of ours that it be not any different treatment for someone who lives in the District of Columbia and someone who lives out in the Eighth Circuit and someone who lives here. There is a higher court above all of those circuits, and we are entitled to have the interpretation of that court on this all important subject matter. It ought to be left out of

the vagaries of Wigmore and Greenleaf and brought finally so that the citizens of the United States can look at some single authoritative work and say "This is the law."

So that is why I am saying that under the Forte case we contend and we urge with great earnestness, not sufficient perhaps to convince your Honor, that the quantum of proof aliunde offered in this case extra these admissions or confessions, so-called, does not rise to the standard required to meet the requirements set forth in the Forte case, to wit: we claim that there is not substantial evidence of a conspiracy without these confessions.

Now the Kertess case refers to the Dykes case, I think it 2114
is called. We say that the Kertess case has not attempted to overrule or depart from the Forte case, but it does leave counsel, and it is humanly possible, the learned District Courts, not too clear as to whether the departure has been made from the rule in the Forte case.

I have not any right to urge any more to your Honor than I think that the Forte case is the law of this country; and I do not think that the Kertess case has attempted to create any new rule or different rule. It does not say so. There was an entirely different set of facts quite sufficient, I think, to meet the requirements as set forth in the Forte case.

But in any event I want to confine my argument at this time to your Honor to state that we think that if the 2115
Forte case is the law, that we do not believe that there is substantial evidence of all of the essentials of the conspiracy or any conspiracy—we go that far.

I am not going to take the time to review all the evidence, but I will say in passing that they have brought witnesses and put them on the stand, the Government. I do not think the Government can call a witness like Colonel Jacobson to the stand and offer him to your Honor and to the jury as a Government witness and then just laugh

about his statements. They vouch for his, generally for the truth of what he says when they put him on the witness stand as a witness. And every single witness I have asked the question whether or not Samuel Bayer or Martin Bayer in any manner did anything to attempt, as far as he could observe, to affect his judgment as an officer adversely, from the standpoint of bias and disinterestedness and faithfulness and conscientiousness and so on and so on, and all these words that are in the indictment, and each one of them answers in the negative.

So that from the witnesses who have been called, I do not recall a witness—it isn't Colonel Vidal. I asked him as
2117 broad a question as counsel could ask, perhaps most offensively broad: if in any manner, fashion or nature they tried to affect his judgment. I have asked him if they tried to affect his judgment wrongfully, or if they tried to get him into some scheme to affect someone else's judgment. I suppose it won't be binding, his statement, but it ought to be highly persuasive, an officer of the United States Army who has been tendered to the Court and the jury as part of the Government's case.

This whole case divides itself, your Honor, from the standpoint of common sense, into two episodes: one is the uniforms and one is the money. And when you come to the uniforms, your Honor, if it were to be a fact to be argued to the Court and not to the jury, we would not
2118 hesitate to embrace that alternative as showing that if there was anything clear in this case it is that there was no conspiracy to go out and buy uniforms for these officers.

The mountain came to Mohammed, your Honor. The officers came down for the uniforms and they asked for them. There was no one who dangled uniforms in front of them and said "Have a uniform and do something for it."

Now I do not say it is vitally essential that in anything by way of gratuities and the like that the initiative come

from the other side, but it is a pretty good indication as to whether or not there was a plan, or whether or not there was an agreement, because if this evidence is coming in at all properly about these uniforms and the amounts, I can get all through with it. The uniform business must be related to some agreement and it must be an agreement reached by and between, let us say, Samuel Bayer and Elias Bayer: "Well, what will we do in order to affect adversely"—I am going to use that phrase—"the judgment of these officers? We are going to do what? We are going to get them uniforms."

Your Honor, that is just plainly doing violence to the record in this case. That is not true. The evidence in this 2120
case does not prove it is true and the evidence offered by the Government shows it is not true.

The evidence in this case shows, as far as these uniforms are concerned, that never were individuals more innocent of getting into difficulty. It took a little probing in cross-examination of one of the Government's witnesses to find out really what happened, as far as even the statements of so-called admissions were concerned. And I find myself, your Honor, constantly, like a cat chasing its own tail, unable to differentiate the aliunde testimony from these admissions, and I am trying to keep these separate.

But even assuming that the admissions here, as far as the uniforms are concerned, it is the plainest thing in the world that first of all the uniforms came up because Vidal 2121
or Roeser said to Elias Bayer, "What business are you in? I am in the thread business."

"Well, you must know tailors? Yes, I do.

"Well, can you get us a uniform at discount, at cost?" Now, your Honor, that is not our side of the testimony: that is the whole testimony. There is not any other testimony on that point. Well, that is a long distance, your Honor, if we took the theory of the Government that this was some kind of a conspiracy of these two Bayers to be

lurking around in order to find out what night clubs they might find officers from Mitchel Field.

It is a long distance from saying that this was a plan outlined in the beginning to go and debauch the judgment and the honesty and the service of the United States officers by giving them uniforms, when the evidence offered by the Government clearly shows that it was the officers themselves. I do not think it was in any venal manner. I say evidence of gentleness on the part of these officers. I can understand how it could happen. They looked rather shamefaced when they came into this court, men of distinction and rank, talking about uniforms.

2123 Or they may try to pass it off by saying "I heard there was a bit of good gabardine." But the fact was that we were in war times. It was a time when Edward G. Robinson was announcing a $100,000 gift of his own to the U.S.O., and times of generosity and entertaining men in uniforms in canteens, and everybody for the time being was doing everything for the soldiers.

And in that atmosphere they have a drink around a bar, and a man says, "Are you in the business of thread?" "Yes." "Do you know some tailors?" "Yes." "Can I get a uniform at cost?" And that is supposed to be evidence of a conspiracy to corrupt this man.

Your Honor, I perhaps will have gone too far in discussing the evidence, with the great respect I have for this
2124 court, but I cannot refrain from adverting to it. If you get into this evidence and if you analyze every section of it, and if you go all the way with the uniforms, what do you find? You find that the men would not pay for the uniforms. Why? You find that most of them, the uniforms were not any good. They went to these three tailors who attempted to make them look like Fifth Avenue tailors would. They were three little tailors sitting cross-legged on a bench, and they had some material and they did not know how to make the uniforms.

It is not very much of a joke if you had to earn your living that way, and had people from the Army come in and take your time.

The evidence in this case with reference to uniforms shows that the officers came in and they asked for that courtesy, and there is no evidence, your Honor, of anything with reference to these two boys that are the subject matter of this lawsuit.

Perhaps this thing ought to be laughed at. It is perhaps a funny joke at the cost of men's reputation and a lifetime of probity and decency, which are going to be smashed to pieces, but to me it is a mighty tragic affair I can't squeeze any laughter out of any part of it at all. 2126
I think it is a desperately important thing to analyze this evidence and I am trying to do my duty as a lawyer in doing it, and I cannot find where there is any evidence aliunde of a substantial nature to show any kind of a conspiracy at all.

If they came in and showed that they bought uniforms for people, but that is not the evidence, your Honor, in this case. And if it turns out to be a joke or a picayune affair of a few dollars for officers that are fastidious out there at Mitchel Field, acting like a lot of WAC's about different shades of uniform, we cannot help that.

When you get all through, it is a tempest in a teapot and it does not rise to the dignity of substantial evidence to support any charge of corruption, because that is really 2127
what it is.

Your Honor, when it comes to the matter of the payment of the money, there is not evidence, your Honor, of the payment of a five-cent piece in this case aliunde of the admissions or confessions. There is no evidence of the payment or the passing of any money at all. Not a speck. Not a scintilla. There is evidence of the uniforms, whatever that means. I am not responsible. I do not know why the United States Attorney did not see fit to

call witnesses that perhaps could have been called and put on the stand to proye that money was passed. There were other indictments that I cannot close my eyes to, but all I know is that in this case there was no evidence whatsoever of any kind, nature or description of even as much as a five-cent piece passing, unless you take these admissions and these so-called confessions.

Of course we can talk about conspiracy to defraud the United States Government out of the honest and conscientious service of their officers, but everyone in this courtroom knows that as piously as we say it to this jury, this is not a question of bribery; it is not a question of
2129 conspiracy to bribe—everyone in this courtroom knows that in his heart and soul that in essence it is nothnig but that.

Because what is the charge of the Government? The charge of the Government, if we can make head or tail out of it, is that there were things of value given to officers of the United States Government to affect their judgment and thereby obtain substantial favors for members of the families of the Bayers, and that the officers got the money and the Bayers paid it.

If that is not a good Anglo-Saxon description of the crime of bribery, I would like to know what it leaves out in the process.

Whether you call it bribery or—your Honor, you might
2130 just as well come before this jury and say, as they might consider one to another, or among each other: "Well, John Smith, my neighbor, got into trouble last night." "Well, what happened to him?" "Oh, there is something terrible. They have taken him away from his home. He is in a court room." "What is he charged with?" Wait a minute. They look and see. They read it: that the said John Smith did take the said John Brown and his right forearm and his right wrist and his right thumb and his index finger, and did press the same with great force and

violence against the treachea and the windpipe of the said John Brown for a sufficient length of time that it defrauded him out of nitrogen and oxygen for a period of hours, so they had to bury him under terra firma.

About that time someone would say, "Well, they killed the man, didn't they?" "Yes." "Why don't they say so then?"

Your Honor, in this case, of course the United States Attorney has the right to prosecute for an offense of any kind against the United States Government, but if he is prosecuting for bribery, he has not proved it. And I say to your Honor that to get any substantial evidence of the offense charged in this case in the manner in which the Government has outlined its case to the jury, you have got to 2132
get the essentials of bribery in the case. But whatever name you call it, the Government has not produced any such evidence aliunde these confessions.

They have shown—they have not, your Honor, shown any entertainment excepting of a trivial nature. And to be square about this, to enforce the law as it is enforced in our own courts, and not in the French fashion that has been in vogue recently of charging him with being guilty and make him prove his innocence in this case, they show that people were taken to restaurants and bought meals. They have shown that people were given a drink now and then, but they don't connect those individuals with anything concerned with the essence of the corpus delicti, which is
Martin Bayer, for example, in this case. 2133

It is of more than passing importance, your Honor, that we don't even hear these boys mentioned until Colonel Jacobson walks into the office of Samuel Bayer, his little shop, and sees the pictures of these boys on the wall and says, "What are they doing?"

They met Vidal and Roeser and Jacobson before these boys are known by these men to be out at Mitchel Field,

before there is anything hooked up, unless we are going to have flights of fancy imagination.

Well, your Honor, I don't know whether it will serve any particular purpose to attempt further to analyze the evidence. I would like to go down one witness after another, and after all, we don't get evidence out of thin air, and I hope the time has not come where we call atmosphere substance.

If the Forte case is the law, you have got to have more than atmosphere and you have got to have more than a trickle of a suspicion here and there. You have got to have your proof rise to the dignity of substantial evidence.

2135 Your Honor, I think it might be a fair question to ask of the United States Attorney, what does he claim outside of these so-called admissions or confessions by way of proof that rise to the dignity of substantial evidence to prove the existence of any conspiracy of the type set forth in this indictment? It is always a difficult thing attempting to prove a negative, but I think the Government—it is not up to us—at this stage to show that we have proved our innocence. I think we have a right to challenge this Court's attention to the peculiarities of this case, and it means something, your Honor. I don't think anyone has the right to laugh at my argument when I say——

The Court: Why do you keep referring to people laughing? I have not noticed any evidence of that.

Mr. Keenan: Well, I have.

2136 The Court: I have not noticed any evidence of jocular conduct.

Mr. Keenan: I have.

The Court: Well, I have not.

Mr. Keenan: Well, that perhaps is a little feeling of my own. I ought to be experienced enough in the courtroom to throw it aside. I beg your Honor's pardon for repeating that.

But I say, with all the seriousness at my command, that if we are going to get away from atmosphere and we are going to take away these confessions and admissions, it is a pretty difficult thing, I think, for trained legal minds to do. We have got to do it, and I know, with great respect to this learned judge, that he has laws laid out for him to follow that he must charge to juries. Every court has to act in accordance with the law and precedent. They are mighty difficult things to do. It is the law and it has to be done, but we are entitled to come to your Honor at this time and ask for a careful examination and an analysis of the aliunde evidence under any rule.

There is some requirement. You just cannot come in 2138
today with an admission or a confession and just entertain a conviction in a courtroom. You have got to prove a corpus delicti, and it has got to be something. I believe the rule is substantial evidence. It is not beyond a reasonable doubt. That is certain. It is more than a scintilla. And that, your Honor, I think is the office and function and obligation of the court, to measure up this evidence outside of these admissions and confessions, with the conscience that I know is possessed and exercised by everyone of authority in this courtroom, to determine whether or not under such circumstances there is any evidence at all that arises to maintain suspicion.

For example, the only way we can determine that is to forget entirely these admissions or confessions and then look at this evidence. We find evidence of what? Of the 2139
Busch man called on the witness stand. He says that Radovich came there to get a uniform. He is asked a question, your Honor—all Government witnesses; we put on none—and he is asked the question: "What did Elias Bayer say about who is going to pay for this uniform?" He said, "Why, Radovich is going to pay for it." And who says "No," your Honor. Nobody says to the contrary. That is the testimony that comes from the witnesses.

If the evidence is that these officers asked the courtesy of coming in and having their uniforms at cost—and, your Honor, it is also significant that there is not one single witness who has testified to these uniforms that ever hooked them up in any way with the giving of a gratuity or a favor or any consideration of any venal or venial complex. Nothing.

You cannot convict men of a conspiracy and say there is a substantial conspiracy to adversely affect the judgment of officers of the United States because they ask you if you know where you can take them to get uniforms at cost and you say, "Sure, I will try to do that."

2141 If we were to do that, your Honor, we would have to build concentration camps in this country and fill them with everybody that could be accused of affecting the judgment of officers.

Then the cruel thing comes in: that we all know that all types of gratuities and considerations were extended toward men in the armed services, not alone to enlisted men but to officers. People were rather proud of doing those things. You can take these matters which were perfectly innocent, your Honor, and then hook up something that happened later of which there is no evidence at all, your Honor, excepting in these extrajudicial affairs—I think I will so describe them—and then try to hook those on to conduct that is absolutely compatible with innocent conduct, and is the rule rather than the exception, and then

2142 say, Now, that all fits into a nebulous conspiracy to affect the judgment and defraud, with the wide use of the definition of the word. And the bright aurora flushes of crime start to come. From what? From picking a soldier out and giving him a meal. From taking an officer, who lives on limited pay in an inflationary period, even the officers, who have to go out and dandify themselves pretty well, living in the environs of Greater New York, Copacabana, etc., and taking them out to a meal at the Hickory

House, where they don't feed you at the same prices as they do at Childs Restaurant. All of those things went on, and that is all the evidence that you have in this case. 2143

It is true that you have Major Saffron, a doctor. He says that he had a talk way back, months and months before, with Sam Bayer, where Sam Bayer said that he would give anything in the world if his boy would not have to go overseas.

Well, your Honor, I had a boy that I lost a little while ago, and I want to tell you that I could have sat right at the table with Mr. Bayer and said—I mean, I would not have considered myself a criminal in so stating, or on my way to a career of crime. 2144

And I say that anyone that takes a perfectly innocent statement, with nothing more to it than "I would give anything to see my boy not have to go overseas," the expression of an honest man and nothing more? It is just like a man who said that he was afraid when he was going into battle. The greatest generals tell us those are the men who told the truth.

I say, your Honor, that a careful examination of all the evidence that has been introduced by the Government in this case, excluding these extra—that is, so-called admissions of Radovich and of the Bayers, and you find nothing that rises above the dignity of loose suspicions and conduct that not alone is equally compatible with innocence as with guilt, but is almost compelling in the circumstances of the times in which we were living, to compel a finding of honest rather than dishonest conduct. 2145

So therefore, your Honor, I, with great earnestness and at the risk of being quite tedious, I am afraid, ask your Honor, with all the sincerity at my command, to carefully examine the evidence aliunde to see that a great mistake is not being done and a blow being struck at something more important than reputations of individuals or obtaining successes or victories in courtrooms, but the lives of

Samuel Bayer and Elias Bayer and their liberty—the fundamentals of liberty that says that "better that 99 guilty escape than one just man be convicted." That is the philosophy behind it.

Now I have expounded at some length my views on what constitutes admissions. This is all hearsay that is coming before your Honor—every single part of it. It is all objectionable under the hearsay rule, and it was let in only on the basis of being given in circumstances that a man knows that he is telling something that hurts him and hurts his position.

I say to your Honor that reading the whole statement of
2147 the Bayers—and I think you cannot do anything else; you cannot read statements out of the context; you cannot interpret them. You have got to have the whole statement. And when you do, then I think we find in this case, as far as the two Bayers are concerned—again, your Honor, I find myself wandering into the vagaries of these so-called admissions and statements. I cannot keep away from them. I cannot separate them.

So therefore, your Honor, I am going to ask that a great effort be made to separate, to see what is the testimony outside of these so-called admissions that arise to the height that could be called substantial evidence of the commission of a crime of defrauding the United States Government. Therefore, your Honor, I make a motion that the verdict be directed for the defendants Bayer.

2148 The Court: I do not care to hear the Government's side. As to the basis of the motion assigned by counsel that the indictment does not state a crime, I am satisfied that the indictment does state a crime and that the indictment is sufficient, and that basis is not sufficient for granting the motion.

As to the other basis of his motion, which counsel has argued at some length and with great ability, I simply cannot agree with the contention of counsel.

At the time the admissions were tendered I then very carefully reviewed in my own mind the evidence which had been introduced up to that time. I do not think it appropriate, and certainly not necessary, and I think it would be inappropriate for me to undertake to summarize the evidence, as I recall it, up until the time the admissions were tendered, but I have it very clearly in mind, in my opinion it is amply sufficient to prove a conspiracy under the strictest rules contended for by counsel for the defendants.

Of course there is no proof that at the opening of business on September 1, 1942, a conspiracy was entered into which terminated at five p. m., July 2, 1945, nor is there 2150
any proof that there was a directors' meeting of any kind, a formal gathering of any kind in an office, and a minute entered that "We do hereby establish a conspiracy." Of course there is no such proof as that. And it is not novel to hear the defense made that, as to certain details of testimony, those details are not sufficient to constitute a conspiracy. But in a conspiracy charge all the evidence must be considered which is proper evidence and the circumstances, and all of them taken together, and the necessary and proper inferences to be drawn from those circumstances. And taking all the evidence which has been introduced in this case prior to the admission of the admissions or confessions, I am satisfied that that evidence was sufficient to justify the jury in believing that there was the conspiracy alleged in the indictment, and to be convinced of 2151
that beyond a reasonable doubt.

So the motion is overruled and an exception may be noted.

Now are you ready to proceed, gentlemen?

Mr. Ansell: If your Honor please, I grew a bit apprehensive lest it might be said that my motion for a directed verdict might be found to be deficient as too narrow, and I should like your Honor to grant me leave to amend that

motion by inserting therein the additional grounds that the evidence was not sufficient to constitute prima facie proof of the charge.

The Court: Very well. The motion of the defendant Radovich by his counsel may be considered as so amended, and as amended is overruled, and an exception may be noted if so desired.

Now are you ready to proceed, gentlemen?

Mr. Ansell: We are ready, your Honor.

The Court: Which one of you wants to put proof in first.

Mr. Ansell: It seems to be agreeable that we will proceed.

2153 The Court: All right, sir. Call your first witness. Call the jury, please. First, let us all take about a ten-minute recess.

(Short recess.)

(The jury returned to the courtroom.)

Mr. Ansell: May I have Major Price, of the War Department.

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MYRON H. PRICE, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

2154 Q. Major, may I ask you, sir, in testifying, will you lift your voice so that the jury and the gentlemen at the counsel table and at this table also may hear.

Major, you are appearing here in obedience to a subpoena, bringing with you some War Department records, are you not? A. Yes, sir.

Q. Have you those records with you now? A. I have those records with me now.

Q. In the course of my examination I probably will have to walk over to you to inspect those records, and Mr. McGohey, the United States Attorney, will probably do likewise. I should like to ask you, sir, whether you have there among your records the orders ordering Major Walter V. Radovich from the States here overseas to Burma or India probably in the very late part of the year 1943? A. No, sir.

Q. You haven't got that, sir. Would you be kind enough to tell me whether that——

Mr. Ansell: You will not object to this, Mr. McGohey.

Q. (Continuing) —order would be found, you think, in 2156
any of the Bureaus of the War Department or here at Mitchel Field? Would you be kind enough to tell me where you think such an order might be found? A. I don't believe I could state where that could be found, sir.

Q. May I ask you, sir, what branch of the Army you are a member of? A. The Adjutant General's Department.

Q. And you don't know whether that order would be found in the Adjutant General's Department or not? A. I do not know.

Q. May I ask you, Major, whether you have among your papers what is commonly referred to in the Army, and now elsewhere, as a 201 file of this officer? A. Yes, sir.

Q. May I ask you to look over that 201 file and see 2157
whether you can discover from that file any reference to the time that Major Radovich left this country in the late months or days of 1943 for overseas service in Burma or India? A. No, sir.

Q. May I ask you, sir, if you have among your papers there orders ordering Major Radovich from Burma or India some time near midyear 1944, to our country, the United States? A. There is a reference in an endorsement in these papers.

Q. Would you be kind enough, sir, to let me look at that? A. (Witness shows paper.)

Mr. Ansell: Will your Honor bear with me a little bit, sir?

The Court: Certainly.

Q. May I ask you, Major, to read this record that you have just pointed out to me, omitting insofar as you can the symbols and make it an easily understandable document, with all the substance except the symbols, etc? A. (Reading) "Headquarters First Air Commando Group, APO 690, 23 September, 1944. To: War Department,
2159 Adjutant General's Office, Washington, D. C.

"1. Major Walter V. Radovich, 0-416891, was returned to the United States from this theatre in accordance with letter order No. 302 Headquarters Army Air Force, India-Burma Sector, China-Burma-India theatre, dated 11 May, 1944, with instructions to report to the Commanding Officer Airport of Debarkation, for further orders."

Mr. Ansell: Do you wish to inspect this, Mr. McGohey?

Mr. McGohey: No, I will accept Major Price's reading of it.

Q. This communication then recites that Major Radovich
2160 was ordered to return from that foreign theatre to this country by communication dated 11 May, 1944, is that right, Major? A. Yes, sir.

Q. You have not, however, sir, any further orders ordering or suggesting the ordering, by reference, of this officer from the Burma theatre to the redistribution center at Santa Monica? A. No, sir.

Q. May I ask you, sir, if you have the orders ordering the defendant Radovich, Major Walter V. Radovich, from

Santa Monica redistribution center, to Mitchel Field? I would suggest that that will be found in Special Order No. 201, August 3, 1944. A. No, sir.

Q. You have not that? A. No, sir.

Q. May I ask you whether in the file which you have before you, the 201 file, as I understand it, there is any reference indicating when this officer was ordered from the redistribution center at Santa Monica to Mitchel Field? A. Yes, sir (indicating on record).

Q. Who signed that? Off the record.

(Discussion off the record between Mr. Ansell and the witness.) 2162

Q. May I ask you, sir, whether this document that I am looking at now indicates anything about the order ordering Major Radovich from Santa Monica to Mitchel Field? A. No, sir.

Q. May I ask you, Major, whether you have any report upon Major Radovich made out upon him at the redistribution center at Santa Monica? A. No, sir.

Q. May I ask you, sir, whether you have among your records there any record or statement showing the age of Major Radovich? A. Yes, sir.

Q. Will you indicate that to me? A. (Witness indicates.)

Q. You are exhibiting a record which contains a birth certificate and also the accompanying statement showing the age, rather the date of birth, of Major Radovich. Will 2163
you please state what is shown there as the date of birth? A. 16th day of November, 1919.

Q. Major Price, may I ask you, sir, whether you have among your files any reference to any military decorations or citations awarded to Major Walter V. Radovich by our Government as well as by the British Government? A. There is a record of some decorations awarded by our Government.

Q. By our Government? A. Yes, sir.

Q. You have nothing, however, with respect to any award made to this officer by the British Government? A. No, sir.

Q. May I ask you, sir, whether the mention made of the awards made by our Government to this officer recites the citation that was given to the officer and made at the time of the award of the particular military decoration? A. I believe so.

Q. Have you there, sir, the award of the decoration and the citation accompanying the award of what is known as the Air Medal to this officer? A. Yes, sir.

2165 Q. May I look at that?

Mr. Ansell: Mr. McGohey, would you like to look at it?

Mr. McGohey: Will you pardon me for just a minute?

Mr. Ansell: Certainly. You pardon me, will you?

(Mr. McGohey then stepped up to the witness stand.)

Mr. McGohey: May we approach the bench, your Honor? I have asked for a conference at the bench.

(The following took place at the bench:)

Mr. McGohey: I haven't objected to the materiality of this up to this point, but, as I understand it now, we are going into the reading of citations that were issued to Major Radovich.

2166 Mr. Ansell: That is right.

Mr. McGohey: Now the Major is in court, he has his decorations on him, nobody has questioned them; but I doubt the materiality of the detail of the citations, your Honor, and I object to the introduction of it on that ground.

The Court: Upon what theory do you contend that they are admissible, General?

Mr. Ansell: On this theory, your Honor. This officer is charged with defrauding the United States, really betraying his duty as an officer of the United States while he was in a military status. It seems to me that anything which shows him to have been a good officer, of unquestioned ability and up to this time integrity, is admissible as very enlightening.

Mr. Robb: It has a bearing upon the officer's military character, which is part of the issue here.

The Court: Now, of course, I am familiar with the rule permitting a defendant to offer testimony of his general good character, but I am not familiar with any rule of evidence which permits particular and definite 2168
good deeds and meritorious action to be proved in the defense of a man charged with an offense. For instance, if a bank cashier were charged with embezzlement, you would not be able to prove that he was a very beneficent gentlemen and had done a great many fine things for the community, would you?

Mr. Ansell: No; I agree with that. But I don't think that is an analogous situation to this.

The Court: Why isn't it, sir?

Mr. Ansell: Suppose, for instance, your Honor, that there were an enlisted man here with a certificate of honorable discharge. That does not have reference to a particular exploit, but covers a period of service in the Army, and probably, the way it seems to me, it 2169
would be the very best evidence of his actual character while he was performing that service. Now this case, your Honor, it doesn't mean—while it recites a particular incident or episode, all of them will cover the service, the entire service of this man as an air service officer.

Mr. McGohey: Your Honor, may I suggest there, I think all this shows is that this man was a brave officer and a good flyer. And, as your Honor indicated,

it indicates that he did particular acts which the Government deemed to be acts of a high value from a military standpoint. But I don't think it is at all arguable from that that the man was an honorable person in the sense that he is charged here with having violated his oath. As a matter of fact, I think it is common knowledge of all of us that many men of great bravery have either before their acts of bravery or after their acts of bravery, been rogues. I remember one of the most notorious gangsters of New York, a Monk Eastman, was out on parole and was in our 27th Division in the last war and performed great
2171 deeds, great heroism. As a result of that General O'Ryan petitioned for the restoration of his citizenship. I don't know that anybody would argue that the fact that he was a brave man eliminated his record.

The Court: There is no suggestion that this man was not a brave and gallant soldier.

Mr. Keenan: I would like to say that it was claimed in the Government releases that were made to the general press, to the country, that these transactions were conspiracies to deprive the Government of the faithful services of Radovich and made a poor flyer out of him.

Mr. McGohey: No, your Honor, that is not so.

The Court: We are not trying him on what appeared in the press.

2172 Mr. Ansell: Regardless of that, your Honor, and of course I am not so inept as not to appreciate the point made by Mr. McGohey. I only say that I can't possibly agree with it, first, as a matter of technical law, a rule of evidence——

The Court: What is that, sir?

Mr. Ansell: The rule that a man when he is charged with a lack of patriotism, is what it means, a betrayal of his Government, in that aspect at least, is not en-

titled to prove not only his military service, but the valiancy of that service. As a matter of policy, I wish your Honor would reflect upon this: after all, people in the Army, indeed I must say a lot of us outside the Army, work for what amounts in a way to nothing but a bauble, but it means much; it is what men strive for, and it seems to me that it would be taking a narrow view for a court to say that if a man were charged with a lack of patriotism, he was not permitted to show that he had not been a brave patriot during war, or peace.

Mr. McGohey: That is not challenged, that is not challenged, your Honor. There is nothing in the Government's evidence or the indictment that charges that 2174
he was not a gallant soldier.

Mr. Ansell: I did not say that, sir. I say, and I think, Mr. McGohey, you ought to heed at least my suggestion, that the charge is that he betrayed his duty and thereby defrauded the United States.

Mr. McGohey: To the extent charged in the indictment.

Mr. Ansell: One moment.

Mr. McGohey: I am sorry, General, I thought you had finished.

Mr. Ansell: Pardon me, sir. Mr. McGohey—I did not charge him with it, I know that in argument counsel, even the United States Attorney, frequently says 2175
what he would not say if not spurred by the spirit of advocacy, but Mr. McGohey, and probably there is some suggestion of truth in it, said that this was of a nature of treason. Now, of course, that is a vast overstatement.

The Court: That is not in this lawsuit.

Mr. Ansell: Oh, no. That was on a motion for continuance here. I have said I am not charging Mr. McGohey; we make statements sometimes loosely, but

here is, your Honor, a very serious charge against a soldier of the United States Army for a betrayal of his duty to the defrauding of his Government.

Mr. Robb: If your Honor please, might I suggest also that these citations are dated during the term which is alleged in the indictment as a term of this conspiracy, when this man is charged with conspiring with the co-defendants on the very dates that these citations are dated.

The Court: I understand that. But I am frank to say you arouse my sympathy in the matter, but I am unaware of any rule of law which would permit
2177 the introduction of testimony of this kind.

Mr. Ansell: Does your Honor base that upon the ground that the awards are made of specific incidents rather than covering a considerable period? Or might I ask your Honor——

The Court: I don't think there is any distinction. I just don't see the materiality. You say you can't give an analogy, but it seems to me that it is quite analogous to where a bank cashier is indicted for embezzlement and he undertook to prove that he has done many fine public spirited acts for the community.

Mr. Ansell: Of course, I follow your Honor on that.

The Court: That would not be admissible, would it?

2178 Mr. Ansell: I do not know. And I do not think, your Honor, that you have a correct analogy. Let me take the case of an enlisted man, and this has been before the courts of several states.

The Court: And he has a discharge certificate?

Mr. Ansell: He has a discharge certificate.

The Court: There is a specific notation of his general character.

2179

Mr. Ansell: But it has not always been so. Even in my own time, we have had discharges that didn't carry that but just simply said he will be enlisted, re-enlisted I mean, your Honor; that did imply something else. But some of the courts started in to hold, State courts—that that discharge certificate was not admissible. The great majority of them held that it was, saying that it was the very best evidence. And the other States have passed statutes—I won't say all of them, your Honor——

The Court: You will not admit my analogy, with undue deference?

Mr. Ansell: You are not——

2180

The Court: I understand that. I can't see yours. Because there is a specific notation on a discharge certificate covering a specific period of the man's general character during that period, and it is the report of a constituted authority as to his general character during that period.

Now it seems to me quite different to admit that and to admit besides a citation of that very soldier for a gallant act during his enlistment in the Army.

What is your—you just came up here very politely and tactfully voiced some views, but do you wish to actually object on the record?

Mr. McGohey: Oh, yes, I intended to. I thought I did. I did object to the introduction of it on the ground that it is immaterial.

2181

The Court: I would like to give the matter a little consideration. I am going to sustain the objection at this time. This officer won't go away tonight, or don't let him go away tonight. And if I change my mind I will notify you in the morning.

Mr. Ansell: Would your Honor bear this in mind? I don't want to beseech you except in this respect.

The Court: I really feel very sympathetic about this thing; there is no question about my duty to rule as a matter of law.

Mr. Ansell: I do not know of anything that means so much to a soldier as these citations.

The Court: You do not have to write a brief to convince me of that. I am thoroughly familiar with that.

Mr. Ansell: And I would regret to see a Federal Court, a United States Court—as a matter of policy I am addressing myself to, to which rules of evidence very frequently bend; I dislike to see a Federal Court
2183 hold that a discharge certificate or any part of that certificate or any medals awarded to an enlisted man, an expert rifleman, sharpshooter, etc., or in the case of an officer—your Honor yourself has certain decorations; I would hate to see a court of the United States say that that statement made by the highest authority of the Government of the United States was not admissible because it was immaterial in a case of this kind to prove his good military character.

The Court: All right, sir. I am going to sustain the objection at this time but I will give it further consideration and let you know in the morning.

Mr. Ansell: Thank you, sir. I am afraid that this has probably torn up the order that I was proceeding with. Your Honor will give me a little time to go back.

2184 (The following proceedings were had before the jury:)

Q. Major, among your records there, have you a record showing the home address of Major Walter V. Radovich, I mean the address before he entered the Army of the United States? A. Yes, sir.

Q. Will you please state what that address is? A. No. 1208 West 52nd Street, Los Angeles, California.

Mr. Ansell: If your Honor please, may we have this witness step down while I call another witness?

The Court: There is no cross-examination on what he has testified to so far?

Mr. McGohey: No, your Honor.

Mr. Ansell: It will be subject, of course——

Mr. McGohey: I have no cross-examination.

The Court: Call the next witness.

(Witness temporarily excused.)

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WILLIAM J. PENDER, having been previously sworn, resumed the stand and testified as follows: 2186

Mr. McGohey: Now, your Honor, may I ask again, leave to approach the bench before this witness is examined?

The Court: All right, sir, come up.

(The following proceedings took place at the bench.)

Mr. McGohey: Now, your Honor, I don't know, no questions have been asked of this witness yet, but I assume that the purpose of this witness is to introduce before the jury now the character of the confinement of Major Radovich at the time he was at Mitchel Field, from August 5th or 6th in 1944——

Mr. Ansell: August 9th.

Mr. McGohey: August 9th, 1944, or until he was released. Now I object to that on this ground, your Honor. If I understood your Honor's ruling, it was that as a matter of law, the statement offered by the Government was a voluntary statement free from duress, and that being so, I think the question of the circumstances which were urged by the defendant to indicate its involuntary character may no longer be pursued. 2187

As I understand the rule, if there is a conflict in the evidence that may then be brought before the jury. But there was no conflict here. The Government offered no evidence at all to the testimony offered by the defendants in support of their claim that the statements were gotten under duress, or the statement of September. And your Honor, as I understood, had ruled that, accepting all of that testimony as true, as a matter of law you held that the September statement was not a statement obtained under duress. But, of course, at no time did the Government offer the September statement. It was only the March statement
2189 that was offered in evidence. And I further understood your Honor's ruling to be that as a matter of law, even if you had found that there was some vice attaching to the September statement, taking all the evidence offered and no controversial evidence being offered, your Honor was of the opinion that the March statement was completely free from duress and was a voluntary statement.

Under that state of the record, I don't believe it is permissible to go over this again before the jury. I think it is now determined as a question of law. There is no question of fact for the jury to determine.

The Court: What have you gentlemen to say?

Mr. Ansell: I say this, your Honor: I find myself in utter disagreement with the United States Attorney
2190 in this. Of course we all concede that the question before your Honor is, whether the statement should be admitted for the consideration of the jury or not. But my contention is that I believe, which I believe to be backed by authority, that having gone to the jury it goes to the jury of course as evidence to be considered by the jury, but the weight to be given to the statement requires a consideration of all the circumstances under which the statement was taken.

The Court: On that proposition I find myself completely in accord. On the question of the admissibility of the statement, that has been passed upon. But I gather from Professor Wigmore that on the weight of the statement the defendant is entitled to introduce evidence as to the circumstances under which it was given. And as to the statement here, it is conceded that the March statement was taken after both the witness Flynn and the defendant Radovich had reviewed the September statement. And I must therefore hold that they are related, and I therefore overrule the objection because I think the defendant under the rule has the right to show the circumstances under which both 2192 statements were taken. Off the record.

(Discussion off the record.)

(The following proceedings took place before the jury:)

*Direct examination by Mr. Ansell.*

Q. Mr. Pender, where and how are you employed now? A. I am employed by the Mitchel Field Fire Department.

Q. You are then in the employ of the Government? A. I am, sir.

Q. You served in the last war, the one that has just ended? A. Yes, sir.

Q. Where did you serve, Mr. Pender? A. I served at Santini Hospital, Mitchel Field. 2193

Q. At Santini Hospital. May I ask you, sir, where is Santini Hospital? A. At Mitchel Field, Long Island.

Q. How long did you serve at Mitchel Field, all told? A. Fourteen months, sir.

Q. How long did you serve at the Santini Hospital? A. Thirteen months, sir.

Q. I understand then the whole time that you were in the military service out there you served as an attendant in this hospital? A. Yes, sir, I did.

Q. May I ask you, sir, whether you were specially assigned as an attendant in this hospital? A. I was, sir.

Q. Had you had in civil life any experience that would seem to qualify you as a hospital attendant? A. I did.

Mr. McGohey: I object to that, your Honor. It is immaterial.

The Court: I overrule the objection. Go ahead.

A. I worked in Kings Park State Hospital, Kings Park, Long Island.

Mr. Keenan: I didn't hear that.

2195 (Answer read.)

Q. I have to ask it again. A. I worked at Kings Park State Hospital, Kings Park, Long Island.

Q. May I ask you what kind of hospital that is?

Mr. McGohey: I object to that.

The Court: Objection sustained.

Q. May I ask you, Mr. Pender, whether prior to the time that you became an attendant at Santini Hospital, you had had any experience as an attendant in a hospital for the insane? A. Yes, sir, I did.

Mr. McGohey: I object.

2196 The Court: I overrule the objection. Go ahead.

Q. Will you tell me what your duties were, briefly and succinctly, but telling us, nevertheless, what your duties were as an attendant in Santini Hospital? A. At Santini Hospital when a patient was admitted we removed all his clothing, left him with no clothing at all, belt or shoes or anything else; razor blades and everything else is taken off him; provide him with pajamas and pajama top, without any rope or cord. Also a bathrobe without any cord.

Q. I fear I must interrupt you. What part of this hospital was it that you were an attendant in? A. I worked in Ward 15.

Q. Ward 15? A. That is right, sir.

Q. Will you tell me what was the purpose and function of Ward 15 in Santini Hospital?

Mr. McGohey: I object, your Honor.

The Court: Overruled.

A. Santini Hospital, in Ward 15, was alcoholic, battle fatigue, nervous condition, and drug addicts.

Q. Those were the patients put there? A. Yes, sir, they were. 2198

Q. May I ask you, sir, whether it was a hospital designed for insane people, either permanently or temporarily? A. It was.

Mr. McGohey: I object to that, your Honor.

The Court: I am going to sustain the objection. I don't think an attendant is qualified to testify what the purpose of a hospital is.

Strike out his answer. Go ahead, sir.

The Witness: Did your Honor sustain the objection?

The Court: Yes, sir. And struck out the answer on the ground that an attendant is not qualified to testify as to the purpose of a hospital. 2199

Q. But you were in what is known as Ward 15 there? A. I was, sir.

Q. And you have testified to the kind of patients, as I understood you? A. I did, sir.

Q. That you received in that ward? A. That is right, sir.

Q. Did you know anything about the other wards of the hospital and the kind of patients that they received in the other wards?

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained. We are interested only in this ward.

Q. In this ward. Were your duties confined as an attendant to the patients in this Ward 15? A. It was, sir.

Q. May I ask you to describe briefly but succinctly this Ward 15. A. As you enter Ward 15, you went through a big iron gate, locked by keys; you went into a ward with rooms on both sides, you passed through another gate, went to a day room; you passed through another gate and you pass through a 13 bedroom. That was one big room.

Q. And all of this constituted Ward 15, is that right? A.
2201 It did, sir.

Q. Were you on duty in that ward when Major Walter V. Radovich was brought there? A. I was, sir.

Q. And confined? A. I was, sir.

Q. Can you tell me the date? A. Around August 8th or 9th of 1944.

Q. And you were on duty there at that time? A. Yes, sir.

Q. And you were there and saw Major Radovich as he was brought in? A. Yes, sir, I was.

Q. Do you know the room that Major Radovich was assigned to or confined in? A. He was assigned to room No. 5, on the right-hand side of the ward.

Q. That is one of these smaller rooms? A. Smaller
2202 rooms, yes, sir.

Q. Will you describe that room? A. In this room we had an iron bed, mattress, sheets, blankets; the window in the room was covered by 7-8 screen—well, heavy wire.

Q. I didn't get that. A. Cast steel iron.

Q. Covered by what? A. Iron or cast steel. I just don't know what the gate is made out of. Then the glass window come, and then a screen to keep the mosquitoes out or flies out, whatever insects may enter. On the right side of the

room it had a bathroom, consisting of regular bath, standing bath.

Q. How large was the room? A. The room was about 6 by 9.

Q. What furniture was in that room? A. Just one chair, sir, and the bed, that is all.

Q. Did the door that entered that room—there was a door, wasn't there, entering the room— A. Yes, sir.

Q. From the hallway? A. That is right, sir.

Q. Was that a door that was locked or not? A. That door was open.

Q. Did it have any lock on it? A. It has a lock on it, to be locked in case it is necessary. 2204

Q. I didn't get that, sir. A. To be locked in case of necessity.

Q. Locked from which side? A. From the outside only.

Q. Who kept the key to the lock? A. The attendant on the ward.

Q. What were your hours of attendance in that ward? A. From 8 in the morning until 8 at night.

Q. I understood you to say that there were what I would describe as grilles— A. That is right.

Q. (Continuing) —over the window? A. That is right, sir.

Q. And that, in addition, there were screens to prevent the entrance of insects and so forth, is that right? A. That is right, sir.

Q. You mentioned a bathroom. A. Yes, sir. 2205

Q. There was a regular toilet seat, was there? A. No toilet seat, sir.

Q. No wooden part that fitted over the porcelain? A. No, sir.

Q. Who brought Major Radovich to Ward 15? A. Major Radovich was entered through the gate, through the First Lieutenant nurse. I don't know who brought him there at the time.

Q. When you first saw him then he was in charge of a First Lieutenant nurse? A. That is right, sir.

Q. And the First Lieutenant nurse brought him to this—A. Gate.

Q. (Continuing) —small room. A. That is right.

Q. Now, Major Radovich being confined in the room, tell me what your duties were with respect to his clothing and adjusting him, preparing him for this confinement? A. He was relieved of all clothing, including shoes, socks, belt; razor, razor blades, pencils—anything that would go to harm himself he was relieved of; and his clothes were taken off and locked up in another room. He was given pajamas,
2207 a pajama coat, and a bathrobe without cord to tie them up.

Q. By reason of your instruction do you know why he was deprived of these things which you have mentioned?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection. Go ahead.

A. He was relieved of those things on—any patient admitted to that ward is relieved of everything. It doesn't make any difference who he is or what he is.

Q. Relieved of everything. A. That means he is relieved of all his clothing, belt, razor blades, shoes, or anything else.

Q. Why should he be relieved, so far as your instruc-
2208 tions were concerned, of his belt, for instance?

Mr. McGohey: I object to that, your Honor. I submit the question has been answered.

The Court: I overrule the objection. I think he has answered it, but I will let him answer it again.

Mr. McGohey: I didn't hear your Honor.

The Court: I overrule the objection. I think he has answered it, but if he has not let him answer it again.

A. He is relieved of his belt, clothing, everything else so there is no possible chance of him committing suicide.

Q. How did Major Radovich get his food while he was confined there? A. His food was placed to him on a platter, on a tin platter, with no knife, just a fork; and he was given a cup of coffee or a cup of milk, whatever he desired to drink.

Q. Did he have a fork? A. He did have a fork.

Q. Spoon? A. Spoon, yes.

Q. Did he always have a fork? A. No, sir.

Q. What happened to the fork? A. The fork was taken away from all patients at an order of 24 hours or some time before that. I just couldn't think of it now. 2210

Q. Then what did he have to eat his food with? A. Just a spoon.

Q. Sometimes he was served beef, I assume Major Radovich was? A. Yes.

The Court: I don't think that makes much difference, whether he had beef or not.

Mr. Ansell: I will not transgress upon your patience, but I still think that these circumstances are vastly important.

The Court: Whether he had beef or something else I think is not too material.

Q. What were your instructions with respect to any visitors visiting Major Radovich while he was there? A. 2211 From the orders of the First Lieutenant nurse, no telephone calls or no visitors while she was on duty, no visitors whatsoever to be entered without permission of the nurse, the First Lieutenant.

Q. I didn't get your answer. A. (Answer read.)

Q. How long did these orders obtain—last? A. These orders lasted for about eight or ten days.

Q. When Major Radovich was brought there did you or did you not see some Army officers with him, bringing him in? A. I didn't see that, sir.

Q. Being deprived of a razor, how would he shave? A. At the request of the Major or the patient, if he wanted a shave he would go out and get his razor and razor blade and insert the razor blade in the razor and go in the washroom and let him shave in the bathroom, with a guard standing over him.

Q. When he visited the toilet was a guard required to keep him in sight all the time? A. For the first eight or ten days, yes.

2213 Q. Even when he visited the toilet? A. Yes.

Q. How did Major Radovich take his confinement? Did he make any complaint or comment of any kind? A. I heard Major Radovich complain three or four times about telephone calls, wanting to get in touch with somebody; he was crying and fretting. But I couldn't do anything for him. I told him to speak to one of the higher-ups when they come in.

Q. Did he complain to you about having no friends thereabout? A. He wanted to get in touch with some friends, he said, maybe on the field, but I couldn't help him out, with a telephone call.

Q. Did you ever hear him make any comment about having an attorney? A. He would like to get in touch with an attorney if——

2214

Mr. McGohey: I ask that the witness be instructed to answer the questions directly. I submit all these questions are——

The Court: I think he is doing the best he can. Go ahead, sir.

Q. Did he make any comment about the absence of his wife and baby? A. He did. He said he wanted to make

a telephone call to get in touch with an attorney or his wife and baby and see what he could do. I said, "I can't do nothing for you." I couldn't let him make no telephone call.

Q. Where did you understand his wife and baby to be at that time? A. Out of town some place. I couldn't tell you where.

Q. You don't know whether they were in or near New York or on the Pacific Coast? A. I couldn't tell you the first thing about where his wife was.

Q. Mr. Pender, I have not examined you I think as to how long Major Radovich stayed in that Ward 15. Could you tell us, please? A. About four or five weeks to my esti- 2216
mation.

Q. That is your estimate? A. Yes.

Q. It might have been longer? A. It could have been longer.

Q. Would you tell me whether or not throughout that time he had any visitors except military people? A. He had military people, and then he had two other civilians with an Army officer.

Q. Could you tell us about when you observed that he was being visited by a party composed of two civilians and an Army officer? A. This day he was supposed to go out for a walk, I gave him his uniform around 12.30 or a quarter to one. In the meantime he had visitors, these two civilians and an Army officer.

Q. Did you know at that time who those civilians were? 2217
A. I do not.

Q. Do you know now? A. No, sir.

Q. Did you know who the Army officer was? A. No, sir, I don't.

Q. Did you know his rank? A. To tell you the truth, I don't.

Q. You had just about got him ready to go out for exercise; did you say that, Mr. Pender? A. I just gave him his clothes, sir.

Q. He was in uniform then at the time you saw the civilians and the Army officer being present? A. Yes, sir.

Q. Do you know who it was that opened the gate leading into this Ward 15 for the admission of this Army officer and the two civilians? A. No, sir.

Q. Do you know whether you yourself did it or not? A. I don't know, sir.

Q. When an Army officer, one in authority, came there to visit this cell, who usually opened the gate for him? A. Either the nurse in charge, or he would see the Captain of the ward and they would open the gate.

Q. So, when an Army officer wanted to seek or wanted
2219 to visit anybody in Ward 15, he was admitted by a person in military authority, a commissioned officer in charge of that ward, is that right? A. That is right.

Q. May I ask you, sir, what opportunities for exercise were afforded Major Radovich? A. The only exercise that was afforded to Major Radovich was when the Provost Marshal sent up somebody to take him for a walk.

Q. When you say somebody from the Provost Marshal's office, you mean an armed man to act as his guard? A. That is right, sir.

Q. Do you know how often he could be exercised? A. He had permission I understand to go out at least once a day.

Q. Do you know whether he went out once a day or not? A. I couldn't say.

2220 Q. I want to revert briefly to the door at the entrance of this Ward 15, and ask you to describe that door. A. It is a big heavy iron gate with bars on it, with a key attached, a key kept by the attendant. It is a regular jail door.

Q. A regular jail door with regular jail keys for the lock? A. Right.

Q. Possibly I don't know what a regular jail is. Describe it. A. It is about——

Mr. McGohey: I object to this, your Honor.

The Court: Objection sustained. He has described the door at least twice.

The Witness: Well, I did not hear you, your Honor.

The Court: I sustain the objection, because he has described the door at least twice.

Mr. Ansell: He had not discussed, if my memory serves me, the kind of lock, which has something to do with the gate.

The Court: I sustained the objection.

Mr. Ansell: I beg your pardon.

The Court: I sustained the objection.

Mr. Ansell: Will your Honor permit me to ask him the weight of the door, his estimate of the weight of the door. 2222

The Court: I will permit you to ask him if he knows the weight of the door.

Q. Do you know the weight of that door, Mr. Pender? A. Around 300 pounds.

Q. I wanted to ask you a question: Do you know anything about any restrictions upon the mail coming in to Major Radovich or going out either? A. All mail in that ward is censored, in or out.

Q. Who censored it? A. The nurse in charge or the officer in charge.

Mr. Ansell: Your witness, Mr. McGohey. 2223

The Court: Cross-examination.

Mr. McGohey: Pardon me for just a minute.

The Court: Certainly.

*Cross-examination by Mr. McGohey.*

Q. Did you see Major Radovich every day while he was in Ward 15? A. I seen Major Radovich every day when I was on duty.

Q. That is what I mean: While you were on duty. A. Yes, sir, I did.

Q. And how many days a week would you be on duty? A. 15 days.

Q. You would be on duty for 15 days on a stretch before you had a day off? A. That's right. It was a swing.

Q. Would you have 15 days on these day hours? A. That's right; sometimes 30 days.

Q. Always during, I think you said, eight in the morning— A. Eight in the morning until eight at night.

Q. Until eight at night? A. Yes.

Q. And at the times you were on duty you saw Major
2225 Radovich every day? A. Every day.

Q. Do you know whether or not he was visited by any doctors during that time? A. He was visited by the Captain of the ward.

Q. Do you know whether the Captain prescribed any treatments for him? A. No, not that I know of.

Q. If treatments had been prescribed for him would it have been part of your duties to give him those treatments? A. It would, sir.

Q. Did you give him any treatments? A. No, sir.

Q. He got no treatments then of any kind during all the time he was there, is that correct? A. That is right, sir.

Q. You talked to Major Radovich, did you, every day? A. I didn't put any confidence in the man at all, sir.

2226 Mr. McGohey: I move to strike that, sir, as unresponsive.

The Court: The motion is sustained. Answer the question.

Q. I asked you, sir, did you talk to him? A. No, sir, I didn't talk to him.

Q. Did he ask you any questions? A. No, sir.

2227

Q. Well, he asked you sometimes for his razor, did he not? A. He would ask for the razor, but that's all. I would never talk to the man.

Mr. McGohey: Pardon me just a minute, your Honor.

The Court: Certainly.

Q. During the time, I think you said it was probably five or six weeks— A. That's right, sir.

Q. That Major Radovich was there while you were on duty did you see any evidence of insanity in Major Radovich? A. To my estimation, no.

2228

Mr. McGohey: I have no further questions.

The Court: All right, sir.

Mr. Keenan: I would like to ask a question, your Honor.

The Court: I will have to deny you that privilege, sir, if it bears on Radovich's statement.

Mr. Keenan: We feel that it bears on the whole case, the type of man that the Bayers were dealing with.

The Court: I have ruled on that.

Mr. Keenan: All right. Note my exception, please.

The Court: Very well.

Mr. McGohey: I have no further questions.

The Court: All right, stand aside. 2229

Who would your next witness be if we called him?

Mr. Ansell: I would rather none at all.

The Court: Very well. Your motion is granted. We will take an adjournment now until 10:30 tomorrow morning.

(Whereupon an adjournment was taken to Wednesday, October 17, 1945, at 10:30 a. m.)

New York, October 17, 1945,

10:30 o'clock a. m.

Trial resumed.

Mr. Keenan: May I approach the bench a moment, your Honor?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: May the record show, your Honor, that Mr. Samuel Bayer was ill this morning with this virus cold that is going around and has a slightly elevated temperature. He is up in my room. And I felt, after talking to the doctor, he would be all right at
2231 noontime, and the present evidence that is put in is not such as he needs to participate in. And I am willing to stipulate with the United States Attorney that the trial may go on for this morning in absentia, and we will bring a stipulation properly signed which will be presented. I think that is acceptable——

Mr. McGohey: A stipulation signed by the defendant himself.

Mr. Keenan: Yes, he will do that.

Mr. McGohey: Waiving whatever rights he had to be present during this morning's session.

The Court: I see no objection to that.

Mr. McGohey: I have no objection.

Mr. Keenan: He has a fever of about 100 now. I
2232 am doing that to save time.

The Court: As a matter of fact, the rule here is quite different from state courts in Virginia, anyhow. The trial may go on, any part thereof, in the court in the absence of the defendant if he is not prevented from being here. If he wishes to absent himself there is no rule requiring his presence.

Mr. Keenan: We are not claiming that he is prevented.

The Court: Our Virginia rule is quite different. Now, of course, if his illness should continue or grow worse and he feels that there is any prejudice to him by reason of his absence, we would have to——

Mr. Keenan: We don't claim that situation. It may develop——

The Court: While I have you here, gentlemen, I want to make another statement while in the absence of the jury. I have reflected more maturely on my ruling about those citations yesterday afternoon and have come to the conclusion to reverse myself and admit the citations.

(The proceedings were resumed in open court within the hearing of the jury, as follows:) 2234

Mr. Ansell: Will your Honor indulge us while we get those citations together?

The Court: Yes.

Mr. Ansell: And may Major Price be recalled to the stand?

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MYRON H. PRICE, recalled, further testified as follows:

Mr. Keenan: Just a moment, General. Would you come up just a moment.

(The following proceedings were had at the bench, not within the hearing of the jury:) 2235

Mr. Keenan: I have a general exception, I believe, to all this testimony concerning any statements of Major Radovich outside the record, but I would like to include at this time——

Mr. McGohey: I didn't hear that.

(Record read.)

Mr. Keenan: Or any so-called admissions. (Continuing) —but I would like now to have an exception

to the reversal of the Court's ruling on the ground that eventually the real question of issue in this case before this jury may be that of veracity between Major Radovich and the two defendants Bayer as to whether or not this constituted extortion or bribery. And in that event it may well be that any evidence that is not relevant in the case to the issues as presented would be prejudicial to the interest of the Bayers, and therefore I take an exception to the Court's ruling in that regard.

The Court: Very well. Proceed, gentlemen.

2237 *Direct examination resumed by Mr. Ansell.*

Q. Major Price, when the Court suspended your examination yesterday afternoon I was questioning you, or was about to question you, about certain decorations that I contemplated in my question to have been awarded to defendant Radovich in this case. Do you remember that? A. Yes.

Q. I would like to ask you, sir, whether you have among your records there the award and citation accompanying the award of what is known as the Air Medal to defendant Radovich? A. Yes, sir.

Q. May I look at it, if you please, sir? A. (Witness exhibits paper to Mr. Ansell.)

2238 Mr. Ansell: If the Court please, may I ask that the witness read the citation to the jury?

The Court: Yes, read it.

The Witness (reading): Citation. Served as pilot. For meritorious achievement in aerial flight displayed on a bombing mission in Northern Burma on 13 March, 1944, during which exposure to enemy fire was probable and expected. The mission was extremely dangerous due to heavy ground fire encountered and hazardous

flying due to surrounding mountainous terrain. Enemy storage installations, trucks and barracks area were definitely destroyed.

"Destruction of this great amount of enemy material seriously hampered the operations of the enemy in this sector and materially aided the allied effort in this theatre.

"The successful accomplishment of this mission by these officers with a display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon themselves and upon the Army Air Forces of the United States."

2240

Q. May I ask you, sir, the date of that citation? A. It is dated 24 April, 1944.

Q. May I look at it a moment, sir? A. (Handing paper to Mr. Ansell.)

Q. And that is the citation of an award of the Air Medal to defendant Radovich in this case, is it, Major? A. Yes, sir.

Q. Have you with you, sir, the general order publishing the same citation? A. No, sir.

Q. Do you know whether or not it was published in general orders of the War Department? A. No, sir.

Q. You don't know, is that what you mean? A. It was not published in general orders of the War Department.

Q. May I ask you, sir, if you have there among the records with you the award of the Distinguished Flying Cross together with the citation accompanying that award? A. 2241
Yes, sir.

Q. May I ask you, Major, to read the citation of that Distinguished Flying Cross to the jury? A. (Reading) "For extraordinary achievement in aerial flight by participating in more than 50 flights over the combat areas of Northern Burma, where exposure to enemy fire was probable and expected. These flights performed in direct support of a new type of air-ground operations were largely

instrumental in the successful operations of the (deleted) air commando group in this theatre. Close coordination was maintained between the bomber, fighter, glider, transport and light plane sections and the ground crew operations of the British, Indian, Chinese and American armies, when critically needed troops and supplies were flown in with both gliders and transports to the vital areas. This close liaison between air and ground operations was primarily responsible for our successes in the Burma area, with destruction of large numbers of enemy aircraft and critical damage to his installations, material and equipment, with a considerable loss of personnel which has ma-
2243 terially reduced his effectiveness and ability to conduct any offensive action against the Allied forces.

"These officers and enlisted men have displayed a devotion to duty and a degree of efficiency above and beyond that normally expected, thereby reflecting great credit upon themselves and upon the air forces of the Allied Nations.

"Pilot from 26 December, 1943, to 25 April, 1944. Home address, 912 East 87th Street, Los Angeles, California."

Q. When you started in reading, if you will pardon me, did you start in by saying in effect that that was addressed to Major Radovich? A. No, sir.

Q. Well, is it addressed to him? A. This was addressed to a number of individuals, sir.

Q. Is Major Radovich included among them? A. Yes, sir. Major Radovich is included. This is his copy of it.

2244 Q. Was Major Radovich awarded the medal with that citation? A. Yes, he was awarded the medal with that citation.

Q. And I shall have to revert to the first citation, the air medal, and ask you if the same thing is true about that? A. Yes, sir.

Q. Have you there, Colonel, a second award, whatever it may be termed in military terminology, the award of a

second Distinguished Flying Cross to Major Radovich? A. Yes, sir.

Q. For my own information, and maybe for that of the Court and jury, is that what is known as a Cluster? A. An Oak Leaf Cluster.

Q. Which means a second one of the same kind? A. Yes, sir.

Q. May I look at this, sir? A. (Witness exhibits paper to Mr. Ansell.)

Q. With the permission of the Court and the parties hereto, will you please read in evidence this Oak Leaf, or second Distinguished Flying Cross citation, from the beginning, if you please, sir. A. (Reading) "Radovich, Walter V., Serial No. 0416891, Major, Air Corps, Headquarters, Army Air Forces, India-Burma Section, China-Burma-India Theatre. APO 671. General Orders No. 99, Section 1. Dated 25 June, 1944. 2246

"Oak Leaf Cluster to the Distinguished Flying Cross by command of Major General Stratemeyer.

"Citation:

"For extraordinary achievement in aerial flight displayed on 8 March, 1944. Major Radovich was a member of a 21-plane fighter sweep over the enemy air field at Anasean, Burma, several hundred miles from home base. His plane was loaded with a large auxiliary fuel tank and one 500-pound bomb.

"With complete disregard for the enemy antiaircraft and ground fire, he successfully bombed the objective and then joined the strafing pattern. In the successful accomplishment of this mission they destroyed 35 enemy planes, strafed ground personnel, trucks and antiaircraft positions, set the gasoline dumps afire and all buildings surrounding the field were completely burned. 2247

"This display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects

great credit upon Major Radovich and upon the Army Air Forces of the United States.

"Home address, 912 East 87th Street, Los Angeles, California."

Q. How long have you been attached to serving in the War Department? A. I have been on duty in the War Department since November 28, 1942.

Q. May I ask you, sir, as such whether you are familiar with that campaign in Burma conducted by us to prevent the Japanese invasion of India? Are you familiar with the progress of that campaign and when it reached its high water mark? A. No, sir.

2249 Mr. Ansell: If your Honor please, I have here a presidential citation of the First Air Commando group, published in General Orders of the War Department.

The Court: That is only the unit citation?

Mr. Ansell: A unit citation.

The Court: All right. It is printed in the official publication?

Mr. Ansell: Quite right.

The Court: All right, you may read it.

Mr. McGohey: No objection.

Mr. Ansell: May I read it to the jury, if your Honor please, sir?

The Court: Yes.

Mr. Ansell (reading): "An Extract from General
2250 Order 26, War Department, Washington, D. C., 9 April 1945.

"The First Air Commando Group is cited for outstanding performance of duty in action during the period 1 December 1943 to 20 May 1944. The First Air Commando Group was given a mission so unusual that few individuals outside the organization considered it feasible. Lacking proper military facilities

for the assembling of their equipment and deprived for security reasons of native labor, officers and enlisted men assembled and tested the airplanes and equipment of the Group in record time. Fighter Pilots loaded bombs and refueled their own airplanes while enlisted personnel unloaded strings of box cars for future operations.

"The task performed by the group normally called for strength of five times their personnel. The comparatively small assault force of the group flew as many as 682 missions in one month, and on one mission, on 8 March 1944, destroyed 20 per cent of the known Japanese aircraft in Burma. The liaison section of the group evacuated as many as 700 sick and wounded in less than three weeks. 2252

"On D-Day the group displayed exceptional team work, destroyed the enemy positions, carried assault troops and engineers behind the enemy lines and supplied them until their mission had been accomplished.

"This display of group heroism and devotion to duty reflects highest credit on the First Air Commando Group and the military forces of the United States."

If your Honor please, I have here a citation issued by the British Government to this officer, an exemplified copy of the citation, that is, under the Great Seal of the British Government, and the certificate of the Ambassador here. 2253

The Court: All right, you may read it.

Mr. McGohey: No objection.

Mr. Ansell: I read to the jury and exhibit the paper. At the top of it there is the seal of the British Empire, and then this:

"Citation. Major Walter V. Radovich, United States Army Air Forces, distinguished flying corps.

"This officer showed the highest courage on D.1 Day when he volunteered to fly in daylight in an undefended

light plane across 180 miles of enemy-occupied Burma to Broadway, where a number of our troops had been wounded and where we appeared to have lost communication. He carried out this task successfully, delivered an operator with a radio set and ciphers and brought out a wounded man. Throughout, Major Radovich displayed complete disregard for his own personal safety and great devotion to duty.

"Certified true and correct copy, the seal of the British Embassy in Washington. (Signed) W. Roxberg, Squadron Leader, Assistant Air Attache."

Your witness, Mr. McGohey.

2255 Mr. McGohey: I have no questions, your Honor.

The Court: You may be excused. Call the next witness.

Mr. Ansell: May I ask the bailiff to find an officer in the witness room from the office of the Adjutant General, a First Lieutenant, who has some papers with him? I don't know his name. I am sorry at the little time I am taking to put on these witnesses.

The Court: All right.

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ABRAM L. WHIPPLE, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

2256

*Direct examination by Mr. Ansell.*

Q. May I for my information ask you your name, sir? A. Whipple, sir.

Q. Mr. Whipple, you have been sent here, as I understand it, from the office of the Adjutant General with certain records that were subpoenaed from or through the Secretary of War; is that correct, sir? A. I represent the Secretary of War, sir.

Q. The Secretary of War? A. Yes, sir.

Q. May I ask you, sir, if you have among your papers that you brought here with you an order, probably in September, 1943, which orders Major Walter V. Radovich from somewhere in this country to overseas, I think the Burma-India-China front? A. Yes, sir, I believe I have (showing paper).

Mr. Ansell: May I, with your Honor's authority and with Mr. McGohey's consent, without reading all this on the record, state that it is an order dated 18 September 1943, ordering then Captain Walter V. Radovich overseas. For reasons that we all can assume, the destination is not specified.

Mr. McGohey: I will stipulate that that is the order.

The Court: Very well.

Mr. Ansell: I have no further questions to ask this witness, if you please, sir.

The Court: Have you any cross-examination?

Mr. McGohey: Your Honor, what is going into the record now is an order dated some time——

The Court: 18 September 1943.

*Cross-examination by Mr. McGohey.*

Q. That order does not indicate when he actually left? A. No, sir.

Mr. Ansell: I think, Mr. McGohey, I speak subject to correction of course, that the time is more accurately fixed in the evidence of record already, and it was later than that.

The Court: All right. No questions——

Mr. Keenan: Do I understand, your Honor, that I am not permitted to ask questions?

The Court: No, sir, I did not say that.

Mr. Keenan: Oh, then I would like to ask a question.

*Cross-examination by Mr. Keenan.*

Q. Can you tell me when Captain Radovich or Major Radovich was ordered to overseas exactly? A. No, sir. This paper we are referring to orders him to an overseas replacement depot for movement overseas.

Q. And that order orders him to go to what overseas replacement depot, Lieutenant? A. Goldsboro.

2261 Q. What is the date of that order? A. 18 September 1943.

Q. 18 September 1943— A. Yes, sir.

Q. —he received an order to go to Goldsboro? A. Yes, sir.

Q. For overseas, for preparation for going overseas, or what? Perhaps you would not mind reading the order to us. That might be the shorter way to get it. A. (Reading) "Captain Walter V. Radovich, 0416891, Air Corps, is relieved from assignment and duty with the First Air Forces, Mitchel Field, New York——"

Q. Not so fast, please. A. "—and from temporary duty at Headquarters, Army Air Forces, Washington, D. C., and is assigned to Project CA-281, and will proceed immediately to Hartford, Connecticut, and Elgin Field,
2262 Florida, for temporary duty of approximately five days at each place for the purpose of coordinating matters pertaining to the AAF Special Project. Upon completion of his temporary duty he will proceed to Washington, D. C., and report to Headquarters Army Air Forces, Lieutenant Colonel Allison, Army 3D819, the Pentagon, for temporary duty not to exceed ten days for the purpose of receiving special instructions with regard to overseas matters, upon completion of which he will proceed to Goldsboro, North

Carolina, and report to the Commanding Officer, Overseas Replacement Training Center, for further temporary duty pending movement overseas, semi-tropical climate."

Then there is some other paragraph about how he is to travel.

Q. You can omit that. A. Another paragraph about immunization.

The Court: You need not read those.

Q. Does that order show where he was stationed at the time that this order was received to make these various stops along the road? A. At that time he was stationed 2264 at the First Air Force, Mitchel Field.

Q. And the date again was September 18, 1943? A. Yes, sir.

Q. Have you the previous order—have you the one previous to that where he was assigned to Mitchel Field? Have you that? A. I will have to look and see.

Q. By the way, what is this file that you are looking at? A. This is known as an Officers 201 File. I don't believe I have that order.

Q. Shouldn't the 201 file of an officer contain data of his movements? A. Not necessarily. There are several 201 files.

Q. Which 201 file is this? Well, wait a minute. A. This is the 201 file that is maintained by the Army Air Forces 2265 Headquarters.

Q. What other 201 files are there? A. There is a 201 file for an officer at every station he is assigned to.

Q. Well— A. A new one is started every time there is a change of assignment.

Q. As long as he remains in the Air Force wouldn't there be a 201 form there for him? A. Yes, but sometimes copies of all orders don't get to the file we keep in Washington.

Q. I am a little bit confused. I would like to ask you again, is there any other distinction between 201 files excepting there may be a succession of them as an officer leaves one place and goes to another? A. No, sir.

Q. Is that the only distinction between them? A. That is correct.

Q. Well, when does this 201 file start, what period of time? A. There is a new 201 file starts for an officer as soon as he gets to a new station.

Q. When does the 201 file start that you have here? A. This started way back at the time he enlisted in the Army as an enlisted man.

2267 Q. Doesn't that continue on as he goes—wait a minute. Withdraw the question. When does it end? A. That is when he is separated from the service.

Q. When does the 201 file that you have start? A. When does it start?

Q. Yes. A. When he——

Q. Take a look at it and see, if you don't mind. A. November 19, 1940.

Q. What was that, the date of his— A. The date of his entry in the service.

Q. What is the last entry that you have in the file, the date of it?

Mr. Robb: What was the date again?

Mr. Keenan: November 19, 1940.

2268 Mr. Robb: 1940?

Mr. Keenan: Yes.

Mr. Robb: Thank you.

A. The last entry I have is 6 July 1945.

Q. Doesn't that 201 file purport to have all the records of the different assignments from one place to another, one camp to another— A. No, sir.

Q. Of this officer? A. No, sir.

Q. Well, I am still confused. Tell me why not, if you can, briefly. A. The assignments—what assignment stations that an officer might have been sent to during his career in the Army appear in another form. It doesn't appear in the 201 file. This is his personal file. It is another word for it.

Mr. McGohey: If your Honor please, I am going to object to any further questions along this line. I don't see that anything that is asked here is material to the issues on trial.

Mr. Keenan: I would like to be heard on that.

The Court: Have you further questions? 2270

Mr. Keenan: Yes, I have.

The Court: All right, go ahead.

Mr. Keenan: Was there a question before the witness at the time of the interruption?

Mr. McGohey: I object to that, that there was an interruption. I have a right to file an objection.

Mr. Keenan: I didn't say there was anything wrong in the interruption, but it certainly was one.

The Court: Don't let's quibble, gentlemen. I don't think any innuendo was implied there. Go ahead. Let us proceed and get along with this case.

Mr. Keenan: What was the last question and answer?

(Record read.) 2271

Q. Well, the personal file here contained the order of his transfer from Mitchel Field down to Goldsboro, does it not? A. Yes, sir.

Q. Well, then, tell me why the file does not contain the order of his transfer, wherever he came from, to Mitchel Field?

Mr. McGohey: I object to that, your Honor.

Q. If you can.

The Court: Overruled.

A. I can't answer that.

Q. Are you sure that it has not been extracted from the file by anyone? A. I have no knowledge of that, sir.

Q. Is there any reason you can tell us why this record should show the date of Major Radovich's transfer to Goldsboro for some overseas duty or perhaps for commando work and would not show his transfer to Mitchel Field? A. No, I cannot.

2273 Q. Certainly this 201 file entry that you have just read of the transfer was to a project of a highly secretive nature, was it not? A. That is correct.

Q. So that as far as the evidence of the transfers of Major Radovich are concerned, this 201 file is not complete, is it? A. Will you repeat that question?

Mr. Keenan: Repeat it to him, Mr. Stenographer. (Question read.)

A. I would say it is complete as far as it goes. All transfers will not appear in any 201 file.

Q. I assume that there is some system to this business of 201 files, is there not? A. Yes, sir, there is.

2274 Mr. McGohey: I object to this, your Honor.

The Court: Overruled.

Q. If you can, explain to me what is the basis upon which you would show a transfer from Mitchel Field to Goldsboro, the one you have read from, and omit in the same file the transfer record from some other place to Mitchel Field?? What is the logic of it? If you can, tell us, briefly. A. Yes, I can.

Q. All right. A. The transfer—every transfer that affected Major Radovich appears in another set of records, not in this set.

Q. Why does this transfer appear in this record when the other transfers do not appear there? A. I can't answer that.

Q. Has any special treatment been given to this 201 file, that you know of? A. No, sir.

Q. There is some evidence of the removal of data from this file on the 5th day of March, 1945, is there not?

Mr. McGohey: Pardon me. Your Honor, may the record show that Mr. Keenan has examined the file 2276
prior to asking that question?

Mr. Keenan: Just a minute. Then the record will show that I have taken not more than five or ten minutes in examining about ten or twelve pages at the top of the file, and it is a very thick list of data that I am unable to describe, more than it would cover about an inch and a half, that I have not had time to examine, and I never have been permitted to have access to this before.

The Court: All right, go ahead.

Mr. Ansell: I wanted to say, if your Honor please, that I regret any apparent discourtesy upon my part for that having referred that to Mr. Keenan. It was purely inadvertent upon my part.

Mr. Keenan: I am very sure, General Ansell, it 2277
was, upon your part.

The Court: All right, go ahead.

The Witness: What is the question?

Mr. Keenan: Read the question, Mr. Stenographer.

(Pending question read.)

The Witness: Yes, sir.

Q. And that comes from the Medical Corps? A. Yes, it is removed from one department of the Air Force to another.

Q. It is requested that the flight surgeon's records requested in the attached correspondence be removed from 201 files and forwarded to address indicated. No record should be maintained as to the disposition of these files. Is that contained in this record? A. Yes, sir.

Q. Why is that, that no record is to be maintained in the 201 file as to the disposition of these medical records of Major Radovich? A. I can't answer that. That letter came from the Air Surgeon's Office.

2279 Q. Came from where? A. The Air Surgeon.

Q. Who is the Air Surgeon? A. The Air Surgeon is a branch of the Army Air Forces, a division.

Q. Is that usual, Lieutenant, as far as your observation is concerned? A. Oh, that is very frequently done.

Q. And do they say that no record of this transfer should be kept? Is that usual? A. That is correct.

Q. Why? Do you say it is usual or unusual? A. I will have to explain that this 201 file, if you care to have me explain it to you——

Q. Yes. A. (Continuing) —is a personal file of an officer. Any correspondence or any letters received by the War Department, if it is an Air Corps man, or any replies that are sent out, any personal matter dealing with an officer, eventually gets into a 201 file. As I said

2280 before, when Major Radovich was assigned to Mitchel Field they started a 201 file there. If he is assigned to Washington, they start a 201 file there. If he is assigned to Utah, they start a 201 file there. Every time a man is transferred they start a new file for matters that pertain to that officer.

If you are talking about orders, official orders that affect him, that is in a record known as 66-2, which shows

every assignment that officer has had since he has been an officer.

Q. But there is a record shown of the assignment from Mitchel Field to Goldsboro, is there not? A. Yes, sir.

Q. And that is an official record, is it not? A. That is correct.

Q. And it is of his movement? A. That is correct, but at that time he was assigned—that order came out of Headquarters, Army Air Forces.

Q. Wouldn't the order transferring him to Mitchel Field come out of Headquarters, Army Air Forces, too? A. Oh, no.

Q. What is the difference, now? Perhaps we will get 2282
some light on it. What is the difference? Why? Where would that come from? A. If the Headquarters, Army Air Forces, was to transfer a man or if they instituted the transfer from one command to another, then it can be directed by Headquarters, Army Air Forces; but a command like Mitchel Field has a right to transfer a man to some other command without permission of Headquarters, Army Air Forces.

Q. Mitchel Field would have the right to command him before he got there? A. That is correct.

Q. It would not be Mitchel Field; it would be somebody else at Mitchel Field? A. It would be the commanding officer.

Q. The commanding officer? A. Everything is under the 2283
commanding officer's signature.

Q. Can you show me any other record in this file—I want to withdraw that question for a moment.

Tell us who a flight surgeon is, please.

The Court: I will sustain the objection previously made to this question. I cannot see any possible materiality to this case.

Mr. Keenan: Well, your Honor, I did not know that there was an objection made to this question.

The Court: An objection was made previously to the whole line. I think now you have reached a point where it is not material and I sustain the objection previously made.

Mr. Keenan: I would like the record to show that we are making this inquiry, your Honor, on the basis of determining why Major Radovich was sent to an insane hospital, and if the flight surgeon would have any reference to that.

The Court: Objection sustained.

2285 Mr. Keenan: Exception.

The Court: Very well.

If you wish time to examine that file, I will take a recess now.

Mr. Keenan: I can tell your Honor that I will not have the time that I would like to in a short recess in an important matter of this kind. I would rather proceed with something else, if time is of the essence, and look it over at a time when I can do justice to it, because I cannot look this file over during any short recess, and if that is in the Court's mind, I would ask permission that this witness come back at a later time and I will look over the file in the meantime.

The Court: All right.

2286 Mr. Keenan: Would that be done?

The Court: Thank you, sir.

Are there any questions of this witness?

Mr. McGohey: No, I have no questions.

The Court: All right. Will you stand down?

Call the next witness.

(Witness temporarily withdrawn.)

Mr. Ansell: Captain Fritchley.

RICHARD G. FRITCHLEY, recalled, further testified as follows:

*Direct examination by Mr. Ansell.*

Q. You have already been sworn, Captain? A. Yes, sir.

The Court: Yes, he has been sworn.

Q. Captain Fritchley, have you among the papers that you have been directed to bring before the Court here an order ordering Major Walter V. Radovich from Santa Monica Distribution Center, California, to Mitchel Field? A. Yes; I have. 2288

Q. I have in my notes here a special order No. 201, dated August 3, 1944. A. That is correct.

Q. Will you let me look at that order, sir? A. (Witness exhibits paper to Mr. Ansell.)

Q. May I ask you, sir, to read the first two lines of paragraph 19, which seem to be all that could be informative to us, omitting symbols or translating them into a language that we all can understand.

Mr. Ansell: Mr. Keenan, would you want to look at this?

Mr. Keenan: I am occupied for the moment, General. Is there something you wanted?

Mr. Ansell: I wanted to know if you want to look at that order ordering Radovich from Santa Monica? 2289

Mr. Keenan: Yes. Was there some question asked of this witness?

The Court: He was asked to read it.

Mr. Keenan: I have no objection to that.

The Court: Proceed.

A. (Reading) Paragraph 19, Major (1055) Walter V. Radovich, 0416891, Air Corps. Relieved from assignment

duty AAF, RS No. 3 Assigned and will proceed Headquarters, First Air Force, Mitchel Field, New York, on or about 4 August 1944 (Requisition RS——

Q. That is unimportant.

The Court: You do not need that.

Q. Will you state the caption of that order, showing the headquarters and date of its issue, please? A. Yes, sir. (Reading) Headquarters, Army Air Forces, Redistribution Station No. 3, Santa Monica, California. 3 August 1944, special orders No. 201, paragraph 19.

2291

Mr. Ansell: I have no further questions of this witness at this time, sir.

The Court: Does anyone else have any questions?

Mr. McGohey: Will your Honor excuse me just a moment, sir?

The Court: Yes.

*Cross-examination by Mr. McGohey.*

Q. Captain, do you have an order there issued at Mitchel Field at or about the time that Major Radovich arrived there, an order directed to Major Radovich or to anyone else, concerning Major Radovich? A. No, sir.

Q. Haven't you an order there some time——

2292

Mr. Ansell: Mr. McGohey, might I interrupt you, sir, to make this suggestion, and also to his Honor: There were introduced in the independent issue before this Court a good many orders having to do with the subject about which you are now going to interrogate this witness. At that time, as I remember, the United States Attorney stipulated with us that they could be read into the record for that purpose, and the ques-

tion that I am asking now is whether for the present purposes these records might not again be read before the jury?

Mr. McGohey: Oh, yes, I want everything, all of this.

Mr. Ansell: You will pardon the interruption. I thought that is what you were going to adduce out of this witness, and we might save time by proceeding——

Mr. McGohey: Do you want to take the witness again and put them in General?

Mr. Ansell: No, I thought we would do it just as we did before, 2294

Mr. McGohey: Let me read from these?

Mr. Ansell: Well, I was going to introduce them. It makes no particular difference, but I introduced them before and I had hoped that I could introduce them by the same stipulation here before the jury.

The Court: Have you a stipulation?

Mr. Ansell: We had one in the independent issue trial, sir. We have not here.

Mr. McGohey: Your Honor understands that I understood when the General said he had no further questions of the witness that he was through with this subject and with this witness.

Mr. Ansell: I am.

Mr. McGohey: Do I understand now that the General now wants to stipulate to read to the jury all 2295 of those orders affecting the confinement and release from confinement?

Mr. Ansell: That is right.

Mr. McGohey: That were put in in the special proceeding?

Mr. Ansell: That is right.

Mr. McGohey: Your Honor, I am perfectly willing to stipulate that and have the General proceed.

The Court: All right.

Mr. McGohey: Your Honor, right in the transcript——

The Court: We will take a ten-minute recess, ladies and gentlemen.

(Short recess.)

Mr. Robb: If the Court please, we have talked this over and we have agreed with Mr. Wallace and Mr. McGohey that these papers may be read to the jury as they are now.

The Court: Very well. Proceed.

Mr. Ansell: "August 10, 1944. Subject: Confine-
2297 ment of Major Walter V. Radovich. To Commanding Officer, Mitchel Field, New York.

"1. On August 9, 1944, the Commanding General directed that the above officer be confined at your base pending trial by general court-martial for violation of the 95th and 96th A. W."—meaning articles of war.

"2. The Commanding General directs that Major Radovich be kept in confinement until further notice.

"(Signed) Charles H. Caldwell, Brigadier General, General Staff Corps, Chief of Staff."

The second document is an endorsement on that document and is as follows:

"Subject: Confinement of Major W. V. Radovich. To the Commanding General, First Air Force.

"1. Reference is made to letter your HQ"—Head-
2298 quarters—"above subject on file dated August 10, 1944.

"2. It is advised the subject officer was confined 9 August 1944 and remains in confinement as directed.

"(Signed) Douglas Johnston, Colonel, Air Corps, Base Commanding Officer."

The third communication is dated September 16, 1944.

"Subject: Confinement of Major W. V. Radovich.

"To Commanding General, First Air Force.

"Pursuant to instructions of the Commanding General, First Air Force, contained in letter dated 10 August 1944, the above officer is still being held in confinement.

"(Signed) Douglas Johnston, Colonel, Air Corps, Base Commanding Officer."

The fourth communication is dated September 16, 1944.

"Subject: Release from confinement.

"To Commanding Officer, Mitchel Field, New York.

"1. Effective this date, Major W. V. Radovich will be released from confinement and placed under administrative restriction. 2300

"2. The limits of the restriction will be Mitchel Field, excluding the officers' club, base operations, the flying field (and line).

"3. The limits of the restriction will be carefully explained to Major Radovich.

"(Signed) F. O'D. Hunter."

The fifth communication, September 17, 1944.

"Subject: Administrative restriction.

"To Major W. V. Radovich.

"1. Pursuant to confidential letter Headquarters First Air Force, 16 September 1944, F. O'D. Hunter, Major General, United States Army, Commanding:

"You, Major W. V. Radovich, are hereby released from confinement and placed under administrative restrictions. The limit of the restriction will be Mitchel Field, excluding the officers' club, base operations and flying line. 2301

"(Signed) Douglas Johnston, Colonel Air Corps, Base Commanding Officer."

The first endorsement on the communication just read is as follows, first endorsement:

"Receipt and understanding of basic communication acknowledged.

"(Signed) W. V. Radovich, Major, Air Corps."

The next communication is this:

"Major Radovich was released from confinement and placed in administrative restriction by explaining contents of the attached letter and obtaining his signature to the first endorsement. This done in presence of Captain Chase, M. C."—Medical Corps, I suppose—"and Major John Miller, between 10.30 and 10.45, 17 September 1944, Ward 15, New Cantonment Hospital."

That is signed, "Reuben Fingold, Captain, Air Corps."

The next communication, the seventh, dated January 2, 1945. "Subject: Release from confinement, Commanding Officer, Mitchel Field.

2303

"1. Reference is made to letter (confidential) this Headquarters above subject 16 September 1944.

"2. Major W. V. Radovich will be informed that the restrictions imposed by paragraph 2 of letter referred to with the exception of the officers' club, is removed.

"3. He will further be advised that he will secure the personal permission of the Base Commanding Officer prior to his departure from the limits of the Air Base at any time."

That is signed "Frank O'D. Hunter," with some omissions, doubtless meaning Commanding General, Mitchel Field, Air Corps.

2304

Mr. McGohey: Your Honor, that is not entirely all that was read into the record at the hearing the other day. I understood our agreement just before the recess was that we were going to read into the record all the things that were read into the record the other day.

Mr. Ansell: Your Honor, that was not my understanding and I hope, if the United States Attorney is going to make the issue that I contemplate he is

going to make, that the entire subject which was presented in evidence before your Honor upon the independent hearing may not be discussed in the presence of the jury.

The Court: I think that is a proper suggestion. Do you wish to offer further——

Mr. McGohey: Yes, your Honor, I wish to offer the——

Mr. Robb: Just a minute. May we approach the bench on this, your Honor?

The Court: All right. Let the jury retire.

(The jury left the courtroom.)

The Court: All right.

2306 Mr. McGohey: I wish to tender at this time, your Honor, the communication dated 21 August 1944, "Subject: Request for resignation," which was a communication to the Adjutant General through military channels by the defendant Major Radovich, and the endorsements to that communication which were read into the record the other day.

Now, I understand that the purpose of the tender, the purpose, rather, of the evidence which is now being presented to the jury is so that they may have before them for their consideration all of the facts and circumstances surrounding the confinement and the general treatment of Major Radovich at Mitchel Field to consider in determining what weight, if any, they are to give the statement that was introduced 2307 in evidence by the Government, by Major Radovich, that is, the statement by Major Radovich which was introduced in evidence.

Now, since any part of that subject has been opened to the jury, I am of the opinion that the whole thing ought to be presented to them, and I so understood that to be our stipulation prior to the recess.

Mr. Ansell: Mr. Robb participated in the stipulation. I didn't know that that was the stipulation, but of course I am sure that we will have a mutual understanding about that, your Honor. However, I wish to make this statement to your Honor. I was presenting this very document in evidence——

The Court: Which very document?

Mr. Ansell: The ones that we have just read, in a sheaf. And the United States Attorney agreed then and there that they should be entered into evidence, and your Honor was then hearing, as you know, the independent issue. As I was about to finish that,
2309 and I state frankly to Mr. McGohey that I had not intended to put in the last sheet of that sheaf of papers, but Mr. McGohey did say to me, "Shouldn't you read all of it?" and I have no doubt that I said, "Yes, let it go in." Now, that was the first mention made of the tender of Radovich's resignation for the good of the service, as I remember it.

Now, what we were engaged in then was setting up a general picture by which we were endeavoring to cover everything from the time that Major Radovich was confined there up until the time he had made the statement to Mr. Flynn. So that did come in for discussion after that, That was upon that issue. I do not feel, I certainly don't feel that that tender of
2310 resignation for the good of the service ought to be presented to this jury, and I think it would be prejudicial if it were presented.

The Court: Well, let us proceed in order. Mr. McGohey says that he understood that you stipulated and agreed with him that all of this evidence, including the resignation and endorsements, were to be put into evidence in the same fashion, or in substance, as they were heard on the independent issue.

Do I understand you to say that you gentlemen did not agree or did not understand that you were making any such stipulation?

Mr. Robb: That is correct, if your Honor please. Might I be heard on that, inasmuch as I am the one who talked to Mr. Wallace? It is my understanding when we started our discussion that we were merely attempting to get in the record the orders respecting the dates of confinement of the defendant Radovich. After we had discussed that, Mr. Wallace suggested that he would also want to put in these records pertaining to the tender of the resignation, and I told Mr. Wallace then that we would agree that those were 2312
the records but we of course want to save our objection to their relevancy and materiality. Isn't that correct, Mr. Wallace?

Mr. Wallace: Yes, that is correct.

Mr. McGohey: Your Honor——

The Court: Just one second. Then do I understand that your position is that you did not stipulate that the resignation and endorsements should go into evidence, and that if they did you would object to them?

Mr. Robb: Yes. We were more interested in the data concerning the confinement of the defendant.

The Court: Just on the matter of whether there was a binding stipulation, have you any——

Mr. McGohey: Your Honor, I won't press that. 2313
This was in a hurry, with the jury going out, and if General Ansell and Mr. Robb say that they did not intend to so far stipulate, then I am not going to press that. I certainly do not intend to charge bad faith on anybody's part.

Mr. Robb: I understand that.

Mr. McGohey: I am willing to rely, your Honor, on the more fundamental point.

The Court: All right. Then we will consider that there is no stipulation and take up the question of whether the resignation and the endorsements are admissible in evidence at this time, and I will hear you on that.

Mr. McGohey: Now, your Honor, as I said, these circumstances surrounding the confinement of Major Radovich, the type of confinement, the length of it, the first change when he was released from the hospital to the limits of the field and then thereafter relieved of that, as I understand it, are being introduced, as I said before, for the purpose of having
2315 that before the jury in their consideration of the weight to be given to the statement. In other words, the effect.

The Court: It is upon that basis that I am admitting the testimony.

Mr. McGohey: Yes. Now, one of the things that happened to Major Radovich at that time, and one of the things that your Honor will recall, was, on the argument in the proceeding on the admissibility of the statement, the fact that a resignation had been tendered by Major Radovich, that it had been held up for some time, or that the final determination by the War Department had been held up before it was announced to him. I say that the whole story of that resignation, the resignation itself, the endorsements attached
2316 thereto, are all part of the period of confinement which is now being described to the jury. And since we have gone into any part of it, we ought to go into all of it.

The Court: I have this thought about it. Of course, the defendant put it in on the independent issue——

Mr. McGohey: Yes.

The Court: —and there was no objection by the Government. I don't think, by putting it into evi-

dence on the independent issue of the admissibility of the statement, that the defendant has in any way waived his objection to its introduction in testimony generally. So it really comes squarely up against the proposition whether or not the resignation and the endorsements thereon are admissible into evidence as against this defendant, and as to that I must confess I have pretty grave doubt. The circumstances under which the resignation was tendered do not appear to me, under what circumstances he tendered his resignation have not been shown, and it would seem to me that the introduction of his resignation by the Government would be for the purpose of introducing what 2318
tends to be an admission because the resignation, certainly the endorsements thereon, do contain some very damaging statements to this defendant. And without the circumstances of the making of the application being shown, it seems to me difficult for the Court to say that it is admissible. Besides, if the resignation went in, certainly it would mean that the endorsements should go in.

Mr. McGohey: I intended to offer them.

The Court: That gives me even more trouble, whether the endorsements are admissible. The endorsements of course are official records. But they are statements of opinions and conclusions made by persons who are not here as witnesses and subject to cross-examination. It gives me great concern whether 2319
statements of that kind, made outside of court and by persons who are not subject to cross-examination, and as expressions of their conclusions and opinions upon evidence which is not here—it seems to me to be very doubtful that it would be proper to admit them.

Mr. McGohey: Your Honor, I assume that counsel for Radovich will argue strenuously, as they have

before, your Honor, that the whole circumstance of the confinement tended to make this statement involuntary, and tended to make any subsequent statement based on the September statement involuntary. And one of the things I assume they are going to argue, as they did before your Honor, is that here was this man held, as they say, from August until some time the following June before he was served with court-martial charges——

The Court: No.

Mr. McGohey: —and that that was unreasonable.

The Court: They haven't gone into that. If they
2321 did, that might put a different complexion on it.

Mr. McGohey: That is what I am thinking about, your Honor, because certainly one of the circumstances surrounding the delay in the bringing of this man to trial on court-martial charges was this resignation that was offered in 1944 and rejected in March, 1945, right during the period when this man gave the two statements, one in September and one in March. If that issue is going to be excluded and not pressed before the jury, then that makes a difference in whether or not I want to offer this. But if I am going to be confronted with an argument that this man was laid hold of and thrown into some kind of jail, as it is called, and then dragooned around that field, and all the time wondering whether he was going
2322 to be charged with anything or not, when all the time it is in the record that he submitted his resignation and that the Commanding General, who has been said to have been very unduly harsh with him, was recommending the acceptance of the resignation on the ground that a gallant soldier of this kind, having confessed his error, ought to be given an opportunity of rehabilitation, I think all those facts ought to be brought before the jury.

The Court: If, as and when the case gets to the situation which you suggest, then I might admit the resignation, but it has not reached that. A great many things you have said have been argued in support of the defendant's motion to exclude the admission, but there is no evidence of that kind before the jury here.

Mr. McGohey: Well, your Honor, I am afraid if that comes up in summation it is going to be too late for me to do anything about it.

The Court: Yes, but there has been no proof or allegation of any undue delay in bringing this man to trial. 2324

Mr. McGohey: Do I understand then, your Honor, and I am not trying to fence with you, that I may reoffer it at such time later on as I think it is material and relevant?

The Court: Yes, sir. You may reoffer it if you are so advised, on cross-examination of the witness or in your rebuttal, and I will consider it then. I am disposed not to admit it now.

Mr. McGohey: Very well, your Honor. I won't press it further at this time.

The Court: I say, in the posture of the case as at present, although it is a novel question to me—I did not anticipate it when the examination of this witness started, and I haven't had a great deal of time to think about it, but I am certainly not definite in my opinion that you have a right to admit it certainly at this time. 2325

Mr. McGohey: Well, I shan't press it any further.

The Court: So I am not going to permit it to be admitted now. But of course you have leave to offer it later if you are so advised.

Mr. McGohey: Now may I ask, just so that we can get straightened out, if the time comes when I do offer

it, in the event that your Honor at that time should admit it, may we now agree with counsel that what appears in the transcript may be read rather than bringing this man back?

Mr. Robb: We have already agreed to that, Mr. McGohey.

Mr. McGohey: So that is all right.

Mr. Robb: Surely.

The Court: And also let me direct counsel that if the Government does wish to offer it, to take it up with me in the absence of the jury. I wouldn't want you to say, and I am satisfied that you would not, in
2327 the presence of the jury, that "I now offer evidence of the defendant's resignation." I know you would not do that.

Mr. McGohey: No, I would not do that, your Honor, for two reasons, first, I don't think it would be fair, and then I am sure your Honor would take me in hand at that point promptly.

The Court: Well, that is conceivable.

Are there any further questions of this witness?

Mr. McGohey: No, your Honor, I have no further questions.

The Court: All right, call another witness.

Mr. Ansell: Are you through, Mr. Keenan?

Mr. Keenan: No, I have not any further questions.

Mr. Robb: If your Honor please, I understood from
2328 Mr. Keenan that he might want to call this witness back as part of his case. Is that right?

Mr. Keenan: Yes, he has some records.

Mr. Robb: I assume the witness will be here then.

The Court: Yes. All right, call the next witness and call the jury in. Whom will you have next?

Mr. Robb: Mr. Keenan.

Mr. Keenan: Do you want to call me?

Mr. Robb: Yes.

The Court: Do you mean that you are calling Mr. Keenan as a witness?

Mr. Robb: Yes, sir, on one particular point.

The Court: All right.

(The jury returned to the courtroom and the following proceedings were had in the presence of the jury:)

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JOSEPH B. KEENAN, called as a witness on behalf of defendant Radovich, being first duly sworn, testified as follows: 2330

*Direct examination by Mr. Robb.*

Q. Mr. Keenan, you are the same Joseph B. Keenan who is counsel in this case, for the record? A. Yes.

Q. And how long have you been a member of the bar, sir? A. Since 1913—1914.

Q. Have you also held certain official positions? A. Yes. I was the Assistant Attorney General of the United States from 1933 to 1936, in charge of the Criminal Division. I was then the First Assistant to the Attorney General of the United States from 1936 to 1939, when I returned to private practice.

Q. Mr. Keenan, in the course of your preparation for this trial did you interview Colonel Jacobson, who testified 2331 here on behalf of the Government? A. I did.

Q. About when was that? A. I would place it some time in the month of July.

Q. Of what year? A. Of 1945.

Q. Mr. Keenan, upon cross-examination in response to certain questions by me Colonel Jacobson testified that he had a conversation with the defendant Radovich in the hospital at Mitchel Field in which conversation the de-

fendant Radovich told Colonel Jacobson that he had received some money, without mentioning the amount, from the Bayers and Colonel Jacobson testified that he told you about that conversation with the defendant Radovich. Let me ask you, did Colonel Jacobson ever tell you about that conversation?

Mr. McGohey: I object to this, your Honor, on the ground that it is improper examination. They are trying now, as I see it, to contradict something which they brought out from the witness on cross-examination.

2333 The Court: I will overrule the objection.

Q. Did Colonel Jacobson tell you that? A. He talked to me about a conversation with Major Radovich.

Q. Yes, sir, but did he tell you that Major Radovich had ever told him that he had received any money from the Bayers? A. He did not.

Mr. Robb: That is all, thank you.
The Court: Any cross-examination?
Mr. McGohey: I have no questions.
The Court: Stand down. Call the next witness.
Mr. Robb: I will call Mr. Levy.

2334

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WASHINGTON IRVING LEVY, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Robb.*

Q. Mr. Levy, for the record, you are the same Mr. Levy who is of counsel in this case? A. Yes, sir.

Q. How long have you been a member of the bar, sir? A. Somewheres around ten years.

Q. And have you also held certain official positions? A. Yes, sir.

Q. What were they, please? A. Well, I was in the Criminal Division of the Department of Justice, Claims Division.

Q. How long? A. Somewheres around three years.

Q. Mr. Levy, let me ask you whether or not you were present when Mr. Keenan, who just testified, interviewed the witness Jacobson? A. I was.

Q. About when was that? A. During the summer, somewheres around July or August; the latter part of July, 2336
maybe.

Q. Let me ask you whether or not the witness Jacobson in that interview ever told you or Mr. Keenan in your presence anything about a conversation in which Major Radovich had told him, Jacobson, that the defendant Radovich had received some money from the Bayers?

Mr. McGohey: I object to that, your Honor, on the ground that I urged before, that it is impeaching their own witness.

The Court: Overruled.

A. Well, I remember he spoke of a conversation with Major Radovich, but I don't recall him saying anything about money that Major Radovich received. 2337

Mr. Robb: That is all, thank you.

Mr. McGohey: No questions.

The Court: Stand down. Call the next witness.

(Witness excused.)

Mr. Ansell: Sergeant Kelly.

VINCENT JOSEPH KELLY, recalled on behalf of defendant Radovich, having been previously duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

Q. Mr. Kelly, may I ask you, sir, what your present position is? A. I am a detective of the Nassau County Police Department.

Q. And I caution you to raise your voice at least so that I can hear. Did you serve in the Army during this war now ended or about to end? A. Yes, sir, I did.

2339 Q. Where did you serve? A. I was stationed at Mitchel Field.

Q. How long did you serve there? A. At Mitchel Field?

Q. Yes. A. Oh, about a year and a half.

Q. From what time to about what time? A. April, 1943, I was sent to Mitchel. Then I went down to Miami for a while and then I came back to Mitchel. I don't know the exact dates offhand.

Q. Were you discharged from Mitchel? A. Yes, sir—well from Mitchel to Fort Dix.

Q. Were you serving at Mitchel Field in the months of August and September, 1944? A. Yes, sir, I was.

Q. How long have you been a police officer, Sergeant? A. Seventeen years.

Q. And you were a police officer then, of course, before
2340 you entered the Army? A. Yes, I was.

Q. And after you had been discharged you went back to your old job as a police officer? A. Yes, I did.

Q. And your present rank is what? A. Detective, Nassau County.

Q. While you were serving at Mitchel Field, will you please state what your duty was? A. I was an investigator in the Provost Marshal's office, in charge of all the investigators in the office.

Q. Do I understand from that that you were the chief investigator for that office? A. Yes, sir, I was.

Q. May I ask you, sir, if in the months of August or September, 1944, you came to see and know the defendant here, Walter V. Radovich? A. Yes, sir, I did.

Q. Will you relate the circumstances surrounding the occasion when you first saw him? A. I was assigned by Major Anthony, the Provost Marshal of Mitchel Field, to act as a guard for Major Radovich while he was confined to the hospital and to take him out daily for exercise in and around the hospital grounds.

Q. Do I understand that when you first saw him it appeared that Major Radovich had been in the hospital 2342
some time or not? A. I believe he was in there about two weeks before I took over.

Q. I wish you would state specifically, if you can, what your duty was with respect to taking Major Radovich out for exercise, the way you put it? A. Well, sir, I would report to the hospital and the Major would either get dressed or he would be dressed and I would take him out of ward 15 and we would walk around, and probably be out an hour, maybe an hour and a half, and then I would return him to the particular ward where he was confined.

Q. Would you tell me whether you went over there and took him out daily? A. No, sir. There were days that I could not make it, that I could not get over there. The understanding was that if I was busy he would miss out 2343
on his exercise.

Q. If you were busy doing something else? A. Yes, sir.

Q. Then you did not go? A. That is right, sir.

Q. When you did go, did you go at some particular hour or was an hour prearranged? A. Well, it was prearranged. I was supposed to get over there some time after lunch, but sometimes it would be a little later when I would get there.

Q. When you went over and saw Major Radovich, as you saw him frequently thereafter, what ward in the hospital, if you know, was he confined in? A. He was in the psychopathic ward.

Q. Had you been familiar with that ward before or did you acquire some familiarity with it as you went over in the performance of your duty with respect to Major Radovich? A. It was after I had gone over to pick him up. I did not know too much about the ward before that.

Q. May I ask you, sir, if you please, to describe this ward 15, the psychopathic ward?

2345 Mr. McGohey: I object to this as repetitious, your Honor. We have had that already.

The Court: I will let him testify. Go ahead.

A. The ward was a wing of the hospital in Santini, and when you came into it there were two or three rooms, reviewed by the doctor in charge and nurse in charge, and those rooms were separated from the ward itself by a door, a grilled door, a steel door of some kind. And you would be admitted by an attendant. They would open the door just like a regular jail door. And there were rooms on each side of a hallway extending down, and the Major was confined in the room on the right. I think it was the second room on the right.

Q. How large was the room in which Major Radovich
2346 was confined? A. Well, as I recall, the room was just deep enough to take a bed, and while it might have been 10 feet wide, 9 or 10 feet wide, something about that, and about, well, maybe 7 feet deep, of course the bed would just fit in on the one side, and I think there may have been a little bit of room at the foot of the bed, but not too much.

Q. What kind of a bed was it? A. I believe it was a hospital bed, a regular hospital bed.

Q. When you took Major Radovich out to walk around were you under arms? A. Yes, sir, I was.

Q. Do you know whether Major Radovich could get out of this ward 15 except when you, his guard, took him out? A. I don't believe he could get out unless he was taken out by some officer from the First Air Force, but the way I understood the orders, I was the only one who was supposed to take him out.

Q. And, so far as you know, you were the only person in military authority who did take him out? A. Yes, sir, as far as I know.

Q. Was he permitted to go anywhere, so far as your orders over him were concerned, without your going with 2348
him armed? A. No, sir, he wasn't permitted. He was confined to the base.

Q. To the base? A. Well, I mean to the area surrounding the hospital.

Q. Yes. A. And I had to be with him, and, naturally, I couldn't let him go, and I would return him to the ward and put him back in there, and then I was through, once he was back in under the care of the attendant.

Q. Had he wanted to attend divine service as mass, you would have to accompany him under your orders? A. Yes, sir, I would have.

Q. And you would have had to be armed, is that right? A. Yes, sir.

Q. When you came into contact in the relationship just 2349
stated with Major Radovich, will you tell me whether he was taking his confinement there contentedly or complainingly, or how? A. Well, he was complaining about his confinement and he wanted to get an attorney and he wanted to be released, and he made quite a strong complaint. I submitted that complaint to Major Anthony, and he took the necessary steps, and some time later I believe the Major was released.

Q. He was released? A. Yes.

Q. You do not know anything about his getting an attorney as a result of his complaint to you and you to Major Anthony? A. Yes, sir, a Mr. Bradspies went over to see him and I don't know whether Mr. Bradspies represented him. I don't believe he did. He just went over to talk to him. I don't believe he was the attorney.

Q. Do you remember upon one occasion when you went over for the purpose of taking Major Radovich out to walk that you found there, or there came in while you were there, you encountered there, an Army officer and two gentlemen in civilian clothes? A. I saw two men in civilian clothes, but I don't recall any Army officer being there.

2351 Q. Did you know at that time who those gentlemen in civilian clothes were? A. No. Major Radovich informed me that they were F.B.I. agents there to talk to him and that he would not be able to go out with me that day, that they wanted to talk to him.

Q. He at that time, as I understand it, was about ready to go out to you to walk? A. Yes, sir, that is right.

Q. And he was in uniform? A. Yes, sir, he was.

Q. And he then informed you, when you came in to take him out to walk, that some F.B.I. agents were there and he could not go with you, is that correct? A. Yes, sir, it is.

Q. Was there an occasion, Sergeant, when some question was raised or orders were given as to removing the medals, the decorations, from Major Radovich? A. Yes, sir. Or-

2352 ders came from somewhere—where I don't know—for Major Radovich to remove his decorations, and Lieutenant La Plante, Assistant Provost Marshal of our office, went over to the hospital. I drove him over, and we went in and Lieutenant La Plante advised the Major of these orders and that he would have to remove the decorations. And the Major refused to do so and Lieutenant La Plante then returned to our office and he advised Major Anthony. I believe Major Anthony himself went over later, whether

the same day or the next day, I am not sure which. I didn't go with the Major when he went over.

Q. But you did go with La Plante when he went over? A. Yes, I did.

Q. Did La Plante have the order with him? A. He had it in writing, yes.

Q. Did he read the order to Major Radovich, do you know? A. I believe he handed it to the Major to read, because it had to be endorsed by the Major's signature, which he refused to do.

Mr. McGohey: Keep your voice up.

The Witness: He gave the letter, I believe—he gave it to the Major to read, which required the Major's signature, and the Major refused to sign it. 2354

Q. You mentioned Mr. Bradspies. As I understood your testimony, and it may not be right, it was you who suggested to Major Radovich that Mr. Bradspies might serve? A. Major Radovich knew Mr. Bradspies and mentioned his name, and wanted to know whether or not Mr. Bradspies would represent him, and I gave that information to Major Anthony that way.

Q. What was the rank of Mr. Bradspies? A. He was a warrant officer, junior grade.

Q. So far as you know, then, during the time of your visit there, which I assume continued until Major Radovich was released from confinement in that hospital, Major Radovich, so far as you saw or knew, had no assistance of counsel? A. No, I don't believe he did, no, sir. 2355

Q. My understanding of the little room in which Major Radovich was confined is that there was a steel grill over the one window at the one end of the room opposite the door, is that correct, sir? A. Yes, sir, it is.

Q. Well, describe briefly that steel grill. Tell us what it looked like. A. My recollection of it is that it was in

the form of a mesh, a steel mesh, probably, well, not as thick as a pencil; thinner than a pencil. I wouldn't know what the diameter is. I would say a trifle thinner than a pencil. It was just a regular mesh, and I believe it was fastened inside by a lock in a casement on the side of the window. I'm not too sure on that.

Q. Then the grill that we have been talking about was sort of diagonal so as to make diamonds between? A. That's right.

Q. About what size would be the diamonds, if you can estimate? A. I would say about an inch.

Q. Do I understand that this grill was set in a frame
2357 and the frame was locked to a stanchion or something on the door frame or the concrete that constituted the window frame?

Mr. McGohey: I object to the leading character of this question, your Honor.

Mr. Ansell: All right.

Q. May I ask you whether or not, or how this grill opened and shut, if it did, and how it was fastened to the walls in which the window was placed? A. I believe it was set in a framework, a steel framework, and it was fastened by a lock, I believe a lock and a hasp. And I don't know who had the keys for that; probably the hospital attendant.

2358 Q. Was there a screen for the purpose of keeping out insects on that window?

Mr. McGohey: We have been all through this description of the room with another witness, your Honor.

Mr. Ansell: By another witness, your Honor.

The Court: I will permit the question. Was there a screen?

The Witness: Yes, the screen was there for the purposes of confinement, to keep anybody from getting out. That was the purpose of it.

Mr. Ansell: Probably I got mixed in the colloquy with Mr. McGohey. I was interrogating about a screen to keep out insects?

The Court: He answered your question with reference to the screen which he has been describing. You were asked if there was also an ordinary screen such as people use to keep out insects?

The Witness: I believe there was; yes, sir.

Q. Was that on the inside of the steel grill or was it outside? A. Outside. 2360

Q. How would you describe the floor of this room? What was it made of? A. I believe it was linoleum. I'm not sure on that.

Q. Linoleum on concrete or linoleum clear through, or what? A. Oh, it was a concrete floor. I believe the whole building is concrete or stone.

Q. With linoleum on the floor? A. I believe so.

Q. How about the walls of the room, what were they made of? A. Well, stone or concrete; they weren't wood.

Mr. Ansell: Mr. McGohey, you may take the witness.

The Court: Do you wish to cross-examine?

Mr. McGohey: Yes, sir, your Honor. 2361

*Cross-examination by Mr. McGohey.*

Q. Now, Detective Kelly, directing your attention to the day that you saw two civilians in the room with Major Radovich when you came to take him out, you found out from Major Radovich when you came over that these were agents of the Federal Bureau of Investigation, did you not? A. Yes, sir, I did.

Q. Now, am I correct in this: that your testimony is that Major Radovich told you that these men were F.B.I. agents? A. I don't know if he used those exact words, but that's what I understood them to be. I believe he said from the F.B.I. or they were agents, or they are F.B.I. agents.

Q. He indicated to you that they had some connection with the Federal Bureau of Investigation? A. Yes, sir.

Q. And did Major Radovich say that he did not want to go out? A. No, sir, he didn't. He said he had to stay there, that they wanted to talk to him; that he wouldn't be able to go out with me.

2363 Q. By that did you intend to convey to the Court and jury that these agents were preventing him from going out? A. No, sir, I did not.

Q. As a matter of fact, you know that the Federal Bureau of Investigation did not have any jurisdiction in that hospital? A. That's right, yes, sir.

Q. They would not have any power to say whether an inmate there could go or come, would they? A. That is correct.

Q. As a matter of fact, if Major Radovich had insisted on going out that day with you, you would not have permitted the agents to prevent him from going, would you? A. That is correct.

Q. Your testimony is that when you took the Major out you walked him around in the hospital area? A. Yes.

2364 Q. How big was the hospital area? Would you be able to estimate that for us? A. Well, there are quite a few acres in the entire grounds, and the hospital is only part of it. The other part of the grounds is used for barracks and other organizations doing business. The actual hospital grounds itself might have been say an acre or two acres, roughly. I mean, that's the entire building and all.

Q. When you went out on these walks with Major Radovich did you walk constantly while you were out? A. No,

we didn't. We would go down—there was a shaded area down there near a stream that runs through the grounds, and we would sit around there and talk.

Q. And smoke? A. And smoke, yes, sir.

Q. Did you talk? A. Yes, sir.

Q. Did the Major ever talk about this case? A. No, sir, he didn't go into details, other than that he was in a little difficulty and, naturally, which I knew.

Q. Well, what did he say about the difficulties? A. He said he didn't care to talk about it.

Q. Did he ever say anything about getting money from the Bayers?

2366

Mr. Ansell: I object, your Honor. I think there ought to be a reasonable compliance with the scope of the direct examination.

The Court: He is on cross-examination. I will permit the question.

A. No, sir, he didn't.

Q. Well, now, you testified that he did complain about his confinement? A. Yes, sir, he did.

Q. And did he complain that he was not getting a lawyer? A. That is right. He wanted a lawyer.

Q. At the time that he was making that complaint did he talk to you about the case? A. No, sir, I believe the Major thought I knew more about it than I did, because when I came over there he said, "I suppose you know why 2367
I am in here, don't you?" I said, "No, I don't." And I didn't know.

Q. Didn't he at that time tell you why he was in? A. No, sir.

Q. How many times did he talk to you about this Mr. Bradspies? A. Once or twice, I believe.

Q. Was it the first time or the second time that you conveyed his request that Mr. Bradspies be assigned to him to Major Anthony? A. The first time.

Q. Did he tell you why he wanted to talk to Mr. Bradspies? A. He said he wanted counsel, he would like to have somebody represent him, somebody to talk to.

Q. About what, did he say? A. About his case.

Q. But he never talked to you any more than that, about the case? A. No, sir.

Q. Did he mention the Bayers to you at all? A. No, sir, he did not.

Q. In any conversation? A. No, sir.

Q. Now he mentioned Mr. Bradspies to you, did he not? A. Yes, sir.

Q. Did he say to you that he would like to see Mr.
2369 Bradspies? A. Yes, sir, he did.

Q. Then thereafter you conveyed that to the Major? A. I did.

Q. And then thereafter Mr. Bradspies came to see him, did he not? A. Yes, sir, he did.

Q. Do you know whether or not Mr. Bradspies saw him prior to the day when you saw the two F.B.I. agents in the room? A. I think it was prior to the day I saw the two agents.

Q. That Mr. Bradspies was over to see him? A. Yes.

Q. When was the last time that you saw Major Radovich at Santini Hospital? A. I am sorry, I can't answer that. I don't know the dates.

Q. Well, would you say it was some time in September, 1944? A. It could be. I don't like to pin myself down
2370 because I am not sure.

Q. I am asking for your best estimate. A. It could be.

Q. Would you say it was as late as October? A. I am sorry. I can't give you any dates on it.

Q. Well, if I suggest to you that the official records at Mitchel Field indicate that he was released from that hospital some time in the middle or latter part of September, would that refresh your recollection? A. Well, if the records so indicate, then I saw him at that time.

Q. Well, then, may I ask you this: there did come a time, in any event, when he left Santini Hospital? A. That is right, sir.

Q. Did you ever see him on the post after that? A. Yes, sir, I did.

Q. Can you tell us when you saw him? A. Oh, I would see him frequenly because he had to report to our office; we had to know where he was all the time, and he had to call up and let us know where he was. That was in case he was wanted by somebody from the First Air Force. In other words, he was under a restriction; he was just released, but he was restricted to the base unless he had permission to leave. 2372

Q. Did you ever see any order about that? A. I don't believe I did. I believe I was advised that that was the order, but I don't think I saw it; I don't recall seeing it.

Q. Do you know whether there was any order that provided any terms that he had to keep in telephonic or other contact with the Provost Marshal's office? A. I didn't see the order. But all I know is that I was told that that is what he had to do, and he did call; he used to call two or three times a day.

Q. By whom were you told this? A. Major Anthony.

Q. You were a Sergeant at that time, were you? A. Yes, sir, I was.

Q. You were the chief investigator in the Provost Marshal's office? A. That is right.

Q. You had access to the files and orders, did you not? 2373
A. Yes, sir.

Q. Can you tell me whether at this period subsequent to September, 1944, there was any other officer or enlisted man at Mitchel Field who was under similar restrictions to Major Radovich? A. I can't recall offhand.

Q. But you do remember him— A. Yes, sir.

Q. You remember Radovich? A. Yes, sir, I do.

Q. Was there anybody else that was calling up, as you say Radovich was? A. Oh, no, sir, he was the only one called up.

Q. But you never saw any order providing that he had to do that, did you? A. No, sir, I did not.

Q. Can you tell us approximately how big the base at Mitchel Field is? I am not limiting myself now to the Base Headquarters area; I mean the total area of Mitchel Field. A. Well, Mitchel Field, I believe some of the runways run about 6,000 feet, and you probably got about another half of a mile not devoted to runways. I would say maybe three square miles, two square miles.

2375 Q. Now, are there canteens on the post? A. Yes, sir, there are.

Q. Are there recreation areas? A. Yes, sir.

Q. And buildings where men recreate? A. Yes, sir.

Q. There are places where there are public telephones, too, are there not, detective? A. Yes, sir, there are.

Q. Those public telephones do not clear through any Headquarters exchange, do they? A. No, sir, they do not.

Q. Anybody going in and using those telephones can make a call as freely as a person on Broadway? A. Yes, sir.

Q. Now during this period subsequent to the Major's release from Santini Hospital, he could travel any place he wanted on that post, could he not, as far as you know? A. After he was released?

2376 Q. From the hospital. A. Yes, sir, he could.

Q. In that respect he was no different from any other officer or enlisted man on the post, was he? A. In that respect, that is right.

Mr. McGohey: I have no further questions of the witness.

2377

The Court: Any further questions, gentlemen? All right, you may be excused.

We will take a recess for lunch now, ladies and gentlemen, until 2:15.

(Recess until 2:15 P. M.)

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AFTERNOON SESSION.

Mr. Ansell: May we approach the bench, your Honor?

(The following proceedings were had at the bench not within the hearing of the jury:)

2378

Mr. Ansell: Judge, we believe our defense to be in, and ordinarily we would rest here, but there are other co-defendants here who have been sharing the time of course with us, and I had wanted, if possible, to look over the record a bit if the other co-defendants could go on without disturbing what your Honor believes to be orderly procedure. That is, specifically I don't want to rest now though I feel that I will.

Mr. Robb: You mean formally to rest.

Mr. Ansell: I mean formally to rest, of course.

The Court: Well, I think the situation could be covered all right by just letting it be noted that the defendant Radovich now rests subject to leave granted to make application to introduce further testimony at a later time if he should be so advised.

2379

Mr. Robb: I think that is entirely fair.

Mr. Keenan: I think the jury ought to be informed of that, your Honor.

Mr. McGohey: That is, just leave to make application. There is no commitment now; I understand your Honor not to be deciding that you will grant that.

The Court: Well, I have not so decided.

Mr. McGohey: That is what I say.

The Court: But I am saying in fairness that if anything develops from the Bayer case, or if counsel should avow to me that they overlooked something, or something of that sort, I would be apt to give the right to him.

Mr. Ansell: With some frankness I say, Judge, I just simply want to look over the record, if the Court can go on.

Mr. McGohey: All I wanted to make clear was, your Honor, that I am not foreclosed from interposing at the time that is made such objection as I think may be right.

The Court: That is right. I believe in reasonable attitude to everybody. If anybody avows to me that they forgot something, even if it is out of order, you can put
2381 it in.

All right. You wish me to state that to the jury?

Mr. Keenan: I think it would be wise, your Honor.

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Ladies and gentlemen, the result of that conference was that counsel for the defendant Radovich advised me that it is their impression at this time that they have introduced all the evidence which they desire to introduce, but they desire to confer and read the record and not be foreclosed from the introduction of additional evidence if they should be of the opinion that they have omitted anything, and so I have granted them that privilege.

The defendant Radovich, subject to that proviso, now
2382 rests.

Mr. Keenan: The statement about the defendant Radovich's counsel conferring means with Radovich and his co-counsel, Mr. Robb.

The Court: Yes.

Mr. Keenan: I say that because of our close proximity at the table.

The Court: I think that everyone definitely understands that General Ansell and Mr. Robb represent Radovich

and Radovich only and you, Mr. Keenan, and your associates represent the two defendants Bayer and them only.

All right, sir.

Mr. Keenan: Your Honor, could we have this lieutenant recalled who had the 201 record?

Your Honor, I don't think it makes much difference, but I haven't completed the cross-examination of the witness who was called by counsel for Major Radovich, but I think we can go right on without——

The Court: Oh, I think so.

Mr. Keenan: There is no point in going back through it all again.

Mr. McGohey: You have not completed your cross-examination of this witness? 2384

Mr. Keenan: That is right.

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ABRAM L. WHIPPLE resumed the stand.

*Cross-examination (continued) by Mr. Keenan.*

Q. I call your attention to the eighth sheet in this file, coming down from the top, which I am unable to find bears any date. Perhaps you could help me. I don't want to disturb it because of some other comments I wish to make about the file, that is why I haven't disturbed the brads on it. A. That is referring to the basic letter dated 24-2-45. 2385

Q. 24-2-45. And that was a letter from the Infant Jesus Orphanage of Mulaganmudu, Travancore, to the A.G.O.—is that Adjutant General? A. That is right, sir.

Q. (Continuing) —stating that on February 5th they sent parcel post lace valued Rs. 3272.6 to Major Walter Radovich, A B P O 433 No. 1 Air Commandos Group, New Delhi, and would like help in collecting the debt. Is that right? A. Yes, sir.

Q. Now does the record show—it wouldn't show anything more than that? A. I can tell you about it.

Q. What about it? A. That is not the original letter. You have got to understand that military correspondence is entirely different from correspondence that is used in civilian life. That is merely a resume of what was in that letter from that organization, and all those endorsements that appear under it were endorsements that come through the office, but we keep no record of them; you just make a notation as to what was in that particular endorsement. You reply by endorsement; it may be 10 or 12. I have seen 32 endorsements to a basic letter. That is just military
2387 correspondence. You won't find anything more about that letter in this file.

Q. I find out $100 was sent there by Radovich after he got back to this country. A. That is what that endorsement says.

Q. In payment of those laces that he got from the Sisters of Jesus. A. So one endorsement states, but there is no correspondence about that in that file.

Q. This file shows about an accident that was sustained by Major Radovich when a plane crash occurred in 1941 and some people in the aeroplane with him were killed, doesn't it? A. Yes, sir.

Mr. McGohey: I object to that.

2388 Q. And shows that he suffered shock at that time?

Mr. McGohey: I object to this, your Honor, as immaterial.

Mr. Keenan: Your Honor, I want——

Mr. McGohey: It is all immaterial.

Mr. Keenan: I want to——

The Court: I am going to admit it.

Q. The record shows on the official report that out in San Anselno, California, approximately 7.30, on or about the 2nd of November, 1941, Walter V. Radovich, pilot—what does that dash 40 mean? A. No. 40 aeroplane, 40 aeroplanes.

Q. 40 aeroplanes en route from Medford, Oregon, to Fresno, California, element in flight of 13 Hughes leading period Lieutenant Speckham— A. That is a period.

Q. —leading, that is right, period. Speckham and Truax crashed and killed, Lieutenant Radovich jumped in Lucas Valley near San Raphael, broken leg and shock. Is that correct? A. Yes.

Q. There is evidence of other accidents, too, subsequent to that, isn't there? Or do you know? A. I believe this next sheet counsel is looking at refers to the same crash. I believe that is a duplicate report. 2390

Q. Then, isn't it a fact that on the 16th of March, 1942, there is a request for transfer? A. Yes, sir.

Q. With reference to Second Lieutenant Walter V. Radovich, and that the captain of the Medical Corps, the flight surgeon, certified as follows: "It is my opinion that it is to the good of the service and to the benefit of Second Lieutenant Walter V. Radovich, that he be transferred from pursuit flying to a transportation group because of his severe airplane accident of recent date." Is that correct? A. Yes, sir.

Q. That is another accident, apparently, other than the one in 1941? A. No, I don't believe it is. I believe it is the result of that accident, from reading this record. 2391

Mr. McGohey: Your Honor, I press my objection now of the utter immateriality of all this line of questioning.

Mr. Keenan: Your Honor——

The Court: I will overrule the objection.

Q. That is, the file shows that as late as March 16, 1942, it was considered advisable to transfer him from pursuit flying to a transportation group because of his severe airplane accident? A. Yes, sir.

Q. The result of that lasted that long, apparently? A. Sir, you will have to read the rest of that file with endorsements to get it correctly. You will have to read all the endorsements that go with the letter to get the true picture. This is one of them (indicating).

Q. You are calling my attention to another one on the 7th of March, 1942? A. Yes, sir.

Q. All right. I would like to read that. That is from
2393 Station Hospital at Air Base, Hamilton Field, California, Office of the Surgeon. Is that correct? A. Yes, on that stationery, yes, sir.

Q. Yes. And the subject is: "Request for Reassignment," is that correct? A. Yes, sir.

Q. And it was sent by Walter V. Radovich. He was then a Second Lieutenant, is that right? A. Yes, sir.

Q. And that is made to the Commanding General of the Fourth Air Force, San Francisco, California, through channels? A. Correct.

Q. (Reading) "1. Request that I be relieved from assignment with the 57th Pursuit Group, 65th Squadron, Boston, Massachusetts, and be assigned to the 64th Transport Group, Hamilton Field, California.

"2. The reason for this request is that I feel I will be of
2394 more benefit to the service of the Transport Squadron due to the injuries received in aircraft accident November 2, 1941, while on an authorized flight.

"3. In the event this request is approved, there will be no added expense to the Government."

Have I read the part that you think is significant, Lieutenant? A. Yes, sir.

Q. And that shows that Lieutenant Radovich himself thought——

Mr. McGohey: I submit, your Honor, that it speaks for itself.

The Court: I will sustain the objection.

Mr. Keenan: All right, your Honor.

Q. Are you pretty familiar with this file, Lieutenant, fairly familiar? A. I have read through it two or three times.

Q. Do you notice that the items therein contained do not follow in sequence from the standpoint of the dates? A. No.

Mr. McGohey: I object to this, your Honor. The condition of the file is certainly not material to this issue. 2396

Mr. Keenan: I do not know whether it is or not, your Honor. I claim it is.

The Court: Go ahead. The objection is overruled.

Q. Do you see here the tenth endorsement? Dated what, please? A. That is undated.

Q. Undated? A. Yes, sir.

Q. Is that normal correspondence, to have the endorsements undated? A. That very frequently happens.

Mr. McGohey: I object to this, your Honor.

The Court: I will overrule the objection.

A. Very frequently a piece of correspondence will be undated. The next endorsement might refer to an undated endorsement. 2397

Q. Does this— A. I will have to read the next endorsement to see what the eleventh refers to.

Q. And what do you call the next one, the eleventh? A. Yes, sir. No, it does not mention it.

Q. This tenth endorsement is—would that be before the eleventh one? A. Yes, sir.

Q. So that it is some time prior to April 25, 1942? A. Yes, sir.

Q. And we would assume in recent proximity thereto. Would that be safe, from the standpoint of date? A. Not longer than a week I should say.

Q. And that is signed by Philip G. Cochran, Captain of the Air Corps, Commanding; is it not? A. Yes, sir.

Q. And the fourth endorsement states——

The Court: The fourth paragraph.

Mr. Keenan: The fourth paragraph, thank you, your Honor.

2399 Q. The fourth paragraph states that if there is any doubt as of his physical or mental well being after his return to his squadron, then he should be transferred; is that correct? A. That is what that paragraph says.

Q. That is signed by Philip Cochran? A. Yes, sir.

Q. Have you any reason to believe that these records are not authentic?

Mr. McGohey: I object, your Honor. I submit the record speaks for itself.

The Court: Do you have any personal knowledge of the defendant Radovich?

The Witness: Not of him.

The Court: I am permitting you to testify and
2400 then to be examined just as to the records. You are the custodian of those records?

The Witness: That is true.

The Court: All right.

Q. Now, will you kindly tell me what that tenth endorsement that I just read of Philip Cochran, Captain, refers to? A. I will have to go back to the basic communication and see what the subject is about.

2401

Q. It ought to be reasonably related to the endorsement? A. Yes, sir.

Q. Please do so. A. (Witness examines papers.)

Q. It is not in the file at all, is it? A. I don't see the basic letters, sir.

Q. That is unusual, is it not, in the file to have endorsements without any basic letter attached thereto? A. No, I would not say it is unusual, sir.

Q. Well, what do these endorsements refer to? A. I have no way of knowing unless I see the basic communication.

Q. Isn't it ordinary and proper to have the basic communication or a copy thereof, to which these endorsements are attached, in order to make the file intelligible?

2402

Mr. McGohey: I object to that, your Honor. The conditon of the file is not material in this case.

The Court: I will overrule the objection.

A. I have the basic letter.

Q. All right. A. Dated March 17, 1942.

Q. Would you mind telling me what the difficulty was in locating it?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Well, I would like to know what it is. I could not find it.

Mr. McGohey: Well, it is there.

2403

Mr. Keenan: He had a little difficulty, too.

Mr. McGohey: I object to the question as immaterial.

The Court: I will sustain the objection.

Q. What is the basic letter? A. That was the application from Walter V. Radovich for reassignment.

Q. Is that the one that we referred to before, March 17, 1942? A. I believe it is, sir.

Q. That you asked me to read? A. Yes, sir.

Q. And what is this next communication of March 16, 1942, that is between this that you have just pointed out and the endorsements to which we referred? A. That is a recommendation from a C. C. G. Porter, Captain, Medical Corps, to the Commanding Officer, Hamilton Field, that in his opinion it would be for the good of the service for then Lieutenant Walter V. Radovich to be transferred from pursuit flying to transportation group. It has nothing to do with the other basic letter that we are talking about.

2405 Q. It refers to some request for transfer, does it not? A. The flight surgeon had apparently initiated a request for transfer, or at least made a recommendation.

Q. It appears then from here that it was the flight surgeon that made the suggestion that Lieutenant Radovich quit the pursuit flying as early as March, 1942, and go to a less dangerous operation? A. It would so appear.

Q. That is because of injuries he sustained previously? A. I would not know about that.

Q. It was something that appealed to the surgeon, was it not?

Mr. McGohey: I object to that, your Honor.

The Court: Sustained.

2406 Q. Now, there was a recommendation for promotion of the major from the Air Promotion Board, and that was dated the 8th of March, 1943, is that correct? A. Yes, sir.

Q. And it was a recommendation for promotion of Captain Walter V. Radovich to the grade of Major, and that is not favorably considered by the A.A.F. promotion board because of insufficient service, is that correct? A. Yes.

Mr. Robb: Because of what?

Mr. Keenan: Insufficient service.

Mr. Robb: Insufficient service.

Mr. Keenan: Yes.

Mr. Robb: In other words, he had not served in that grade long enough.

Q. Now, I notice this, on a communication dated the 3rd of September, 1943, and it is signed by M. Carl Goetz, Major of the Air Corps, and it is addressed to whom? A. On the military correspondence the bottom line here (indicating) is the person that writes the communication. It is known as the record and routing sheet. It is addressed to Assistant Chief of Air Staff Personnel, Orders Branch.

Q. That is dated the 3rd of September, 1943, is it not? 2408
A. Yes, sir.

Q. And it has a lot of abbreviations in it? A. Yes, sir.

Q. It does say: "1. Request for so much of R and R, dated August 28, 1943, regarding Walter Radovich 041689" —that is his serial number, I take it? A. Yes, sir.

Q. Be revoked. A. Yes, sir.

Q. Now, will you tell us what R and R, dated the 28th of August, 1943, what that it? Find that for us. A. I don't see it in the file, sir.

Q. Do you have any idea where it could be, to help us? A. No, I have not, unless it is referring to another paper that went through relative to his promotion. I believe it is dealing with his promotion.

Q. What does R and R mean? A. R and R means the routing and record sheet. It is just military correspondence 2409
that is used in Headquarters Army Air Force.

Q. It means something was being revoked, does it not, by order of the Major, he was requesting that something be revoked? A. The R and R that they referred to probably had a request to have something done and this revokes that request that was in a previous R and R.

Q. Isn't it a peculiar thing to have something in the file revoking——

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Just a minute. I would just as soon step up to the bench, but I want to finish my question first.

The Court: Go ahead.

Q. Isn't it a peculiar thing, Lieutenant, in your files to have an application for a revocation of something remaining in the file and not have the base matter in which they are discussing likewise in the file?

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

2411

A. No, sir. I tried to point out that an R and R is not an order. It is just correspondence in a Headquarters. It is not an order.

Q. Well, it is of sufficient importance that they wanted something revoked in it?

Mr. McGohey: I object to that as argumentative, your Honor.

The Court: The objection is sustained. I have permitted him to testify what the records are and to explain them and not to express an opinion.

Q. This is addressed to Orders Branch, is it not? A.

2412 Yes, sir. You read the copy and that is the original R and R.

Q. Yes, I know, but it is to the Orders Branch? A. Yes, sir; Assistant Chief of Air Staff, Orders Branch.

Q. Would it not have something to do with an order? A. Yes, sir, probably the former R and R requested Orders Branch to do something, and this R and R says to revoke that portion of it.

Q. Now we come to the next one right after it. That seems to be something that I would call a letter. Is that a letter? A. That is a letter, yes, sir.

Q. And it is on the stationery of the War Department and it is restricted, is it not? A. Yes, sir.

Q. That means that there is something secret about it? A. Not necessarily.

Q. What does the term "restricted" mean. Very briefly, in your department? A. Not for the general public.

Q. Well, your files are not for the general public anyway, are they? A. Not if there is any classification on it at all.

Mr. McGohey: I object to this line, your Honor, as immaterial.

Mr. Keenan: I would like to know a little more about what restriction means. 2414

Mr. McGohey: I will press the objection.

Mr. Keenan: I will withdraw the question to save time.

The Court: Go ahead.

Q. That is from the War Department Headquarters, Army Air Force at Washington, and that is dated the 6th of September, 1943, and the subject matter is "Amendment of Orders," and it is addressed to the Commanding General of the First Air Force at Mitchel Field, is it not? A. Yes, sir.

Q. And that says, so much of letter this headquarters dated 1st September, 1943, as requested orders issued relieving Captain Walter V. Radovich from further assignment and assigning him to the A.D. 664A, with temporary duty at Goldsboro, North Carolina, pending movement overseas is revoked. That is correct, is it not? A. Yes, sir. 2415

Q. So that that shows he had previously been ordered to go to Goldsboro previous to the 6th of September, 1943? A. Yes, sir.

Q. And that that order had been revoked? A. Yes, sir.

Q. Now, can you find that in the files? A. I think you had that order this morning. That was the order that transferred him to Goldsboro.

Q. That was the 18th of September, if I remember correctly. Wasn't that the date, the 18th of September? A. If my memory serves me right, it was the 18th of September.

Q. Then, if that is true, this has reference to the 6th of September, 1943? A. There must have been a previous order before the one dated the 18th of September.

Q. That is, Captain Radovich must have received some orders——

2417

Mr. McGohey: I object to this, your Honor. The records speak for themselves now. I object to any interpretation by counsel.

The Court: I am not going to let him express any opinions as to the background and so forth, unless they are orders used, and which contain different phraseology than what is used in ordinary life. I am going to permit him to explain it but not to express an opinion.

Q. Now, with the Court's admonition of explaining without expressing an opinion, Lieutenant, will you tell us if this file does not show that Captain Radovich was ordered some time prior to the 6th of September, 1943, to Goldsboro, North Carolina? A. Yes, sir.

2418

Q. And we don't know the date of that order, as far as the files are concerned? A. That is correct.

Q. Some time prior to September 6th? A. Yes, sir.

Q. And it would be fair to assume from this correspondence some time in that vicinity of time? A. I would say within a week.

Q. And then that order was revoked? A. Yes, sir.

Q. For the reason that the file does not disclose? A. That is correct.

Q. Now, does there appear in this file from your interpretation, without giving an opinion, any reason for just having in the 201 file the order of revocation of his assignment to Goldsboro without having the assignment itself to Goldsboro in the 201 file?

Mr. McGohey: I object to that, your Honor. The condition of the file is not material.

The Court: I overrule the objection.

A. I can't explain why it is not there, sir.

2420

Q. Also there is some revocation of that order that is not there, isn't there? A. According to this letter dated 6th September.

Q. And there is nothing wrong with the authenticity of that letter, is there? It is restricted, but it nevertheless is accurate, isn't it? A. Yes, sir.

Q. We do find 18th September, the next one, so our memory, the both of us, was correct on that? A. Yes.

Q. That is the date the record shows he was sent to Goldsboro—Radovich? A. Yes, sir.

Mr. Keenan: I will show the pertinency of this letter if there is any question about it. It is very brief.

2421

Q. The file shows that on the 8th of October, 1943, Colonel Goetz authorized Captain Radovich to personnel and temporary duty, to proceed to Mitchel Field, New York, for five days in connection with Special Project No. 9, personnel matters, and on completion of this duty to proceed to headquarters AAF at Washington, D. C., and report to Lieutenant Colonel Allison for ten days' temporary duty. That is right, isn't it? A. That is correct.

Q. What was the project; does this file show what the project was? A. The file doesn't show, and I don't know what it was.

Q. Is that restricted and secret, as far as you know? A. I believe that is a top secret; it was at that time.

Q. Top secret, super secret? A. Yes, sir.

Q. Would it be more super secret than 281?

The Court: I don't think that is material, counsel.

Mr. Keenan: Well, your Honor, the testimony that is already——

The Court: He says he doesn't know what it was and can't explain it.

2423

Mr. Keenan: I don't wish to press it as long as you think I should not.

Q. Now on the 16th October there are instructions for Captain Radovich, who is then said to be in temporary duty, Headquarters AAF—what is that? American— A. Army Air Forces.

Q. Army Air Forces. (Continuing) —to proceed from Washington on the 16th October, 1943? A. That is correct.

Q. That is correct. And that he was instructed to go to Wright Field at Bridgeport, Connecticut? A. Yes, sir.

Q. And Elgin Field. A. And also on the 22nd day of October of 1943, he was also, Captain Radovich, instructed by command of General Arnold to proceed from Washington to California for approximately fifteen days. And the

2424

second paragraph reads: Authority is given to make such variation in his itinerary and to proceed to such additional places as may be necessary for the performance of this mission. That is correct, isn't it? A. Yes, sir.

Q. And that is the 22nd of October, 1943? A. Yes, sir.

Q. Now on the 12th of November, 1943, the Major received authority for travel likewise from Major Goetz for ten days' temporary duty. Correct? A. That is right, sir.

Q. Effective the 13th of November, 1943, to Bridgeport, Connecticut, and thence to Bradley Field; is that correct? A. Yes, sir.

Q. And thence to Mitchel Field, New York? A. Yes, sir.

Q. And thence upon completion of this temporary duty to return to Army Headquarters Air Forces for five days' temporary duty—that is at Washington, isn't it? A. Yes, sir.

Q. And that assigned Captain Radovich to Project CA 281, doesn't it? A. No. He was assigned to that.

Q. Oh, he was assigned? A. Yes, sir.

Q. That second paragraph, that just denominates to which he was assigned. Thank you. What is the fifth paragraph, 2426
"Deliver order to Major Goetz"? A. You must remember that this is a routing and record sheet, which is a request to orders branch to cut these orders sending Major Radovich to these three stations, to cut the order. When the order is cut, to immediately hand it down to Major Goetz, he is waiting for it.

Q. What does the term "cut the orders" mean to us civilians? A. Write the orders.

Q. Write the orders. Here is the first endorsement, to Headquarters, First Fighting Command, Office of the Surgeon, Mitchel Field, Samuel Kato. What is that attached to? That is the first endorsement, isn't it? A. Yes, sir. You have got to find the basic to see——

Q. You have got to find the basic letter to find out what 2427
it means about the surgeon. Give us the basic, please. A. The letter dated 16th October, Headquarters, First Fighter Command, Office of the Surgeon, Mitchel Field, New York.

Q. And that is a communication from a first lieutenant of the Medical Administration Corps, dated October 16, 1943, to the Flight Surgeon of Overseas Replacement Training Center, Goldsboro, North Carolina; is that correct? A. Yes, sir.

Q. And it refers to some form 64 file. Can you tell us what that is? A. I am not familiar with that form number. I believe it is—I can give you the best of my knowledge.

Q. Yes. Well (referring to papers), you say this first endorsement is attached to this? A. Yes. That is the way military correspondence goes. The first endorsement might very well be at the bottom of the first page of the basic.

Q. But it is on top of the next one? A. They haven't got enough room at the bottom, so he puts it there.

Q. They don't have enough room at the bottom?

2429 The Court: I don't see the materiality of that.

Mr. Keenan: It is absolutely incorrect, your Honor.

Mr. McGohey: May I see that, your Honor?

Which is the basic, please, that you are talking about here?

The Witness: This is the basic communication.

Q. May I ask how you know that? A. Well, it is the same subject, and the first and second endorsements follow it.

Q. That is dated December 9, 1943. There is some endorsement on there. A. That is the date it was filed there, the date it was sent to the central file. That is not the date of the endorsement.

Q. All right; then, we will hurry along. There is a
2430 special order 40. Is that an original—is that connected with this? A. This is the order promoting Captain Radovich to Major, Special Order No. 40, paragraph No. 1, dated 1 March.

Q. 1 March, 1944? A. Yes, sir.

Q. That obviously isn't connected with this preceding endorsement? A. It is not. It has nothing to do with these endorsements.

Q. What is it doing in this place in the file, can you tell us that? A. No, sir.

Q. On the 15th of June, 1944, the record shows that for some diagnosis that is pending by communication from the Flight Surgeon to the Base Surgeon, that Major Walter V. Radovich was this date found physically disqualified for duties involving flying? A. Yes, sir.

Mr. Robb: What is the date of that, Mr. Keenan?

Mr. Keenan: 15th of June, 1945—1944. I beg your pardon.

Mr. Robb: 1944.

Mr. Keenan: I have no further questions to ask this witness. But I would like to have this file impounded in this case for further purposes of examination. 2432

The Court: All right, sir, I will direct that it be filed subject to being returned.

Mr. McGohey: If your Honor please, has your Honor ruled on that?

The Court: I did, but I am always subject to changing my mind.

Mr. McGohey: Your Honor, I submit that Mr. Keenan has had this the better part of the day and his examination indicates that he has gone through that pretty completely. I don't know any reason why it ought to be impounded.

Mr. Keenan: I just suggest, is there any harm being done leaving it here a little bit longer until we can peruse it a little more at leisure? 2433

The Court: Frequently witnesses generally attend a trial until it is over, until the evidence is all admitted.

Do you have that file in your personal charge and custody?

The Witness: Yes, sir. I have orders not to leave it unless I am directed by the Court.

Mr. Keenan: May I be permitted to state, and I think it will not be objectionable, that the lieutenant

found it necessary in the performance of his duty to take it away at the appointment of the lunch hour and keep it until he got on the stand.

Isn't that correct.

The Witness: Yes.

Mr. Keenan: You asked me for it?

The Witness: That is correct.

Mr. Keenan: And I didn't see fit to bother you about it, your Honor.

The Court: If the lieutenant is personally responsible for it, I don't blame him for wanting it in his personal possession.

2435 Mr. Keenan: I thank you, your Honor, for the implied compliment.

The Court: No, I was not referring in any uncomplimentary way to you or anyone else, I was referring to the obligation of the Army officer as against all the world. I certainly meant no inference such as you have drawn. If he is going to part with it at all, there is no reason for him to object to imparting it to you.

(To the witness): You just keep the file but remain at the trial until you are excused.

The Witness: Yes, sir.

The Court: Call the next witness. That finishes that part of the case, doesn't it? Are you ready to proceed?

2436 (Witness excused.)

Mr. Keenan: I am ready to proceed, your Honor. I would like to call Mr. Wallace to the witness stand.

The Court: All right, take the stand, Mr. Wallace.

EDWARD C. WALLACE, recalled as a witness on behalf of defendants Bayer, being previously duly sworn, further testified as follows:

*Direct examination by Mr. Keenan.*

Q. You are Mr. Wallace, the Assistant United States Attorney, and you have previously testified in this case, is that correct? A. That is correct.

Q. And you have had charge of the preparation, you have had charge, as Assistant United States Attorney, of this prosecution from its inception to date; is that not correct? A. That is correct. 2438

Q. Under, of course, Mr. McGohey, the United States Attorney? A. That is correct.

Q. And you had Major Radovich come to your office at some time in 1943?

Mr. Robb: If the Court please, might counsel approach the bench at this point?

The Court: Yes.

(The following proceedings took place at the bench, not in the hearing of the jury:)

The Court: What is in your mind?

Mr. Robb: If your Honor please, we find ourselves——

The Court: What I had in mind was, I have ruled that as to the statement of Radovich that I have directed the jury, and will direct them again, that it is not to be considered against your client, and I ruled that you could not examine him on that question. 2439

Mr. Robb: That is the point I had in mind, your Honor.

Mr. Keenan: Yes, but I want to bring out that a part of the defense in this case, the attitude of the United States Government in this prosecution as it

affects not alone the presentation of the matter against Radovich, but against my defendants, the Bayers, that the sequence shows pressure being brought to bear on Major Radovich with reference to his testimony, and we have a right to have Major Radovich available as a witness to tell the truth, free from any type of pressure or influence. And the evidence shows that he was subpoenaed down here and that indictments were returned against Samuel and Elias Bayer—Samuel, two substantive indictments for bribery, and Samuel and Elias together with Greenblatt for conspiracy to violate Section 91, I believe, of Title 18, and that as long as
2441 Radovich continued to co-operate with the Government, as they called it, they did not indict him, but when he refused to co-operate with them he was indicted.

Now, as a circumstance of the case I think I have a right to show this to the jury as reflecting upon the opportunity this defendant has had to present its defense in all aspects, and I think that is highly pertinent, your Honor. It is significant that he was brought back to be interrogated.

The Court: I can't agree with you. I am going to adhere to the ruling heretofore made, which ruling is that based upon everything you have said that would only go to the admissibility of the weight of Radovich's statement, which I have directed the jury may not be considered against your clients, and I adhere
2442 to that ruling and decline to permit you to examine or cross-examine the witness on the stand as you indicated you desired to.

Mr. Keenan: While I do not contend that is the only reason I am asking the testimony of this witness, I ask your Honor, too, to give consideration to the fact that anything that the jury considers by way of any testimony that builds up a corpus delicti is material to all defendants in the case. That we have not, I think,

argued fairly enough to your Honor—perhaps you have given a little time——

The Court: You have covered——

Mr. Keenan: I never mentioned that point in the argument, that anything that is built, any testimony that builds up any part of the corpus delicti is material to any defendant in the case.

The Court: I have considered that phase, too. I adhere to my ruling. You may note your exception.

Mr. Keenan: Does that mean I can't ask Mr. Wallace any questions?

The Court: You can't ask him any questions along the line you have indicated. You are perfectly free to 2444
examine him as to the facts and circumstances of the statements made by the defendants whom you represent.

Mr. Keenan: I am not going to use hi. as my witness for that purpose.

I note an exception.

The Court: Very well.

All right, you may stand down.

(Witness excused.)

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Call the next witness.

Mr. Keenan: I want to ask him some other questions not connected with——

The Court: All right. 2445

EDWARD C. WALLACE resumed.

*Direct examination by Mr. Keenan.*

Q. Mr. Wallace, you have testified in this case about three indictments that were brought against Samuel Bayer other than this indictment——

Mr. McGohey: I object to this, if your Honor please, as being immaterial in this case.

The Court: Unless there is some reason which I don't know about, I am going to exclude any testimony about any other indictment. These defendants are on
2447 trial on this indictment.

Mr. Keenan: Your Honor, it is our claim in this case——

Mr. McGohey: If your Honor please, if we are going to have argument I suggest it be at the bench, on this question.

The Court: I beg your pardon.

Mr. McGohey: I suggest that any argument we are going to have——

The Court: If he makes it in the absence of the jury, if he wants to be heard at length——

Mr. Keenan: Your Honor wishes that we approach the bench and state the——

The Court: Any argument on——

2448 Mr. Keenan: I don't want to argue it, your Honor. I want to present the theory under which we are offering the evidence.

The Court: All right, sir, come up?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: The theory under which we offer this evidence is that the charges that are made in the indictment upon which these defendants Bayer are stand-

ing trial are tantamount to a charge of bribery, and that the real issue in the case as it is now presented, as we take it, is whether or not the defendants were guilty of bribery or subjects of extortion; that we are going to argue that the Government well recognizes that there wasn't bribery because it not alone could have but did indict on charges of bribery and dismiss the causes.

The Court: I sustain the objection and decline to allow any examination on that.

Mr. Keenan: You give us an exception on that, your Honor?

The Court: Yes. 2450

Mr. Keenan: And upon that entire line of testimony that we so offer.

The Court: Yes.

Mr. Keenan: I note an exception.

(The proceedings were resumed within the hearing of the jury as follows:)

Mr. Keenan: We don't have any testimony of Mr. Wallace for the time being.

The Court: All right. Call your next witness.

(Witness excused.)

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C. C. ARMSTRONG, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows: 2451

*Direct examination by Mr. Keenan.*

Q. Will you state your name, please? A. C. C. Armstrong.

Q. What is your business, Mr. Armstrong? A. I am in the textile business, manufacturing cotton yarns.

Q. What is the name of your concern? A. Gastonia Combed Yarn Corporation.

Q. Where are the mills located? A. In Gastonia, North Carolina.

Q. How long have you been with that company? A. Since 1936, its organization.

Q. What is your position with the company? A. Treasurer, sir.

Q. Are you acquainted with the defendant in this prosecution—Samuel Bayer? A. I am, sir.

Q. How long have you known him? A. For twenty-five years.

Q. Have you acquaintances with his business friends and acquaintances in Metropolitan New York? A. Yes, sir.

Q. And the community where he lives? A. Unfortunately, no, sir.

2453 Q. Have you visited him out there in his neighborhood? A. I beg your pardon?

Q. Have you visited him out in Lawrence, Long Island? A. No, sir.

Q. But you do know them in Metropolitan New York? A. Yes, sir.

Q. Have you the means of knowing of his reputation for veracity and character? A. I feel that I do.

Q. You have the means? Yes or no. A. Yes.

Q. What is that reputation? A. Good.

Mr. McGohey: Your Honor, I object. I think the witness' answers indicate that he is not qualified to testify to that.

The Court: I will let him testify.

2454

Q. What is his reputation in that regard? A. Good. Good, sir.

Mr. Keenan: I think that is all.

The Court: Do you wish to examine?

Mr. McGohey: No questions from the Government.

The Court: Stand down. Call the next witness.

(Witness excused.)

SELIG FORTMAN, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Would you state your name a little louder? A. Selig Fortman.

Q. Where do you live? A. Far Rockaway.

Q. Far Rockaway? A. Yes, sir.

Q. You are a rabbi of the Jewish faith? A. Yes, sir.

Q. How long have you been a rabbi? A. In this country fifteen years.

Q. Fifteen years? A. Yes, sir.

Q. And where do you have your temple or congregation? 2456
A. Far Rockaway.

Q. Is Samuel Bayer a member of your congregation? A. Yes.

Q. How long has he been a member? A. Since I remember him, about fifteen years.

Q. Have you been a rabbi for fifteen years, or out at Far Rockaway for fifteen years? A. Rabbi of this congregation fifteen years.

Q. Have you had occasion to visit Samuel Bayer or meet him from time to time over the past fifteen years? A. Of course, yes; he is used to come to shule, come to the synagogue.

Q. Do you know his neighbors where he lives? A. I know his house, where it is. 2457

Q. You go to his house? A. Sometimes, yes.

Q. Do you know his wife? A. Yes.

Q. And his boys? A. His boys I know from the Hebrew school, one of them.

Q. Rabbi, I don't know whether you speak louder to your congregation, but we can't hear you back here. A. I will speak louder.

2458

Q. Have you the means of knowing what Mr. Bayer's reputation is, his reputation with regard to character? A. Yes, sir.

Q. And in his own community where he lives? A. Yes.

Q. And what do you say, rabbi, as to the reputation that Mr. Bayer so has or bears among this group? A. He enjoys a very good reputation.

Q. A very good reputation, is that correct? A. Yes, correct.

Mr. Keenan: I think that is all.

2459

The Court: Any questions?

Mr. McGohey: I have no questions, thank you.

The Court: All right. Call the next witness.

(Witness excused.)

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LEWIS A. ROSEN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Will you state your name, sir? A. Lewis A. Rosen.

Q. And how old are you, Mr. Rosen? A. Sixty-three.

Q. And where do you live? A. 299 Riverside Drive, Manhattan.

2460

Q. Do you know the defendant Samuel Bayer? A. Very well.

Q. How long have you known him? A. Between eighteen and twenty years.

Q. By the way, what is your business, Mr. Rosen? A. I am an attorney.

Q. You are an attorney? A. That is right.

Q. And where do you practice law? A. 261 Broadway, Manhattan, for the last twenty-seven years.

2461

Q. For how long? A. I am practicing since 1907, in 261 Broadway, since the last twenty-seven years.

Q. And do you know the defendant Samuel Bayer? A. I do, very well.

Q. How long have you known him? A. For eighteen to twenty years.

Q. And have you the means of knowing his reputation in the metropolitan community here? A. I do.

Q. And what is his reputation for character and veracity? A. Very fine; very good.

Mr. Keenan: That is all.

Mr. McGohey: I have no questions.

2462

The Court: All right, next witness.

Mr. Keenan: I have another question that I forgot to ask him.

The Court: All right.

*By Mr. Keenan.*

Q. Do you know, Mr. Rosen, the neighbors and acquaintances of Mr. Bayer, at Far Rockaway? A. I have been a neighbor of Mr. Bayer's in Far Rockaway for about sixteen to seventeen years. I just moved to Manhattan three years ago.

Q. I forgot to ask you that. Were you connected with his church? A. I was. I was a member of the synagogue for five years prior to the time I moved to Manhattan.

2463

Q. And was Mr. Bayer an active member of the congregation? A. Very active.

Mr. Keenan: That is all.

The Court: All right, call the next witness.

HENRY FINE, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Henry Fine? A. Correct, sir.

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. 400 West End Avenue, New York.

Q. And what is your business? A. Shirt manufacturer.

Q. How long have you lived in New York City? A. Oh, about fifty years.

Q. How long? A. Fifty years.

2465 Q. And do you know the defendant Samuel Bayer? A. Oh, for thirty years.

Q. What? A. About thirty years.

Q. Did you have business with him? A. Yes, sir.

Q. Extensive, over a period of time, over a long period of time? A. Thirty years.

Q. What is your connection? You say you are in the shirt business? A. Well, we are doing business together.

Q. No, I mean your concern. I just went over that briefly and hastily. What is the name of your company? A. M. Fine & Sons.

Q. Shirt manufacturers? A. Shirt manufacturers, correct.

Q. What is your position with M. Fine & Sons? A.

2466 President.

Q. And in your business relations with Mr. Bayer in Metropolitan New York, did you obtain occasion to observe his character and his reputation among the people with whom he did business, and with whom he lived his life here? A. Yes, sir.

Q. Is that right? A. Yes.

Q. And over a period of years you had an opportunity to observe that? A. Yes.

Q. Do you, therefore, know what his reputation is in the group in New York, yes or no? A. Yes, sir.

Q. And what is that reputation for character? A. A-1.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions.

The Court: All right, that is all. Call the next witness.

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HARRY A. FLORSHEIM, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows: 2468

*Direct examination by Mr. Keenan.*

Q. Will you state your name, please? A. Harry A. Florsheim.

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. Norwalk, Connecticut.

Q. What is your age? A. Sixty.

Q. What is your business? A. Selling agent, cotton yarns.

Q. With whom are you connected? A. A group of mills: Glenn Thread Company, Hampton Company, Ruby Cotton Mills. 2469

Q. Do you have your own business? A. Yes, sir.

Q. What are you, sort of a broker? A. No, we are the exclusive selling agents of these mills.

Q. Exclusive selling agents? A. Yes.

Q. Have you know the defendant Samuel Bayer? A. Yes, sir.

Q. Do you know the people with whom he does business in New York? A. No.

2470

Q. Are you acquainted with that group? A. No, not the ones that he sells to.

Q. Do you know those from whom he buys? A. Fairly well, yes.

Q. How long have you known Mr. Bayer? A. Oh, twenty years.

Q. Have you had an opportunity in Metropolitan New York in your business here to learn of his reputation for honesty and character? A. Yes, sir.

Q. What is that reputation? A. Very, very good.

2471

Mr. Keenan: That is all.

Mr. McGohey: No questions.

The Court: Call the next witness.

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MELVIN USDAN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Will you tell us your name? A. Corporal Melvin Usdan.

Q. What is your serial number? A. 12219208.

2472

Q. What is your business? A. I am a corporal in the United States Army Air Corps.

Q. And where are you stationed? A. I just returned from overseas.

Q. How long ago? A. Approximately three weeks ago.

Q. Where did you return from? A. I returned from the Arctic Circle, Greenland.

Q. Where do you live? Where is your home when you are home? A. 1058 New MacNeill Avenue, Lawrence, Long Island.

Q. You are related to Samuel Bayer? A. Yes, I am.

Q. What is the relationship? A. He is my uncle.

Q. Your father is alive? A. No, he has been dead for five years, sir.

Q. And your mother is a sister of Samuel Bayer? A. Yes, sir.

Q. She lives? A. Yes, sir.

Q. And you are home now on a furlough? A. Yes, sir; recuperation furlough.

Q. Recuperation furlough? A. Yes, sir.

Q. How long do they give you, Melvin? A. They gave me forty-five days, sir.

Q. Had you come directly from Greenland home? A. 2474
No, sir, I came through Labrador and Canada, and then home.

Q. Did you stop at any other place or was that just the route you took? A. I was then en route, sir.

Q. How long? A. I stopped for approximately a month in Labrador.

Q. A month in Labrador? A. Yes, sir.

Q. What is the branch of service that you are in? A. I am in the United States Air Corps.

Q. What were you when you left the United States of America, what was your rank? A. I was corporal, sir.

Q. When were you made corporal? A. I was made corporal at Westover Field, in Massachusetts, 881st Medical Detachment of the Airborne Engineers.

Q. What camp were you at when you were made cor- 2475
poral? A. Westover Field, Massachusetts.

Q What were you when you first came to Mitchel Field? A. I was a private, sir.

Q. What were you when you left Mitchel Field? A. A private, sir.

Q. Do you know Martin Bayer? A. Yes, sir.

Q. How long have you known him? A. I have known him for about nineteen years, sir.

Q. How old is Martin Bayer? A. He is about twenty-two, sir.

Q. Where did you live with reference to Martin Bayer at the time you went into the service? A. My home was right behind his home, sir.

Q. Your home backed into the other? A. Yes, sir.

Q. And did you see much of the Bayer family, that is, of Samuel Bayer's family? A. Yes, sir. During those years I have been very close to my uncle Sam, and in the last five years, since my dad passed away, I was even more close to him.

Q. You were even more close to him since your dad passed
2477 away? A. Yes, sir.

Q. How many cousins have you that are children of Samuel Bayer? A. I have three cousins, sir, but two that are very close to me.

Q. Who are the three? A. The three are Martin Bayer, Robert Bayer and Sanford Bayer.

Q. In the order of their ages? A. Robert Bayer, Martin Bayer and Sanford Bayer.

Q. Where is Martin Bayer? A. Martin Bayer is in Burma, India.

Q. Where is Robert Bayer? A. He is in Okinawa, in the Pacific.

Q. Close to Japan? A. Close to Japan, yes, sir.

Q. Where is Sanford Bayer? A. Sanford is in the United States Navy aboard ship, sir, I believe.

2478 Q. And these three boys, you grew up with them, did you? A. Yes, sir.

Q. Like a member of the family, is that correct? A. It was a second home to me, sir.

Q. A second home to you? A. Yes, sir.

Q. And did you go to the same school? A. Yes, sir, we did. We belonged to the same clubs, also.

Q. And the same clubs? A. Yes, sir.

Q. What kind of clubs were they, Melvin? A. Social clubs and athletic clubs.

Q. What do you call a social club? A. Well, when we had dates and dances, and the topics of the day were discussed.

Q. In a word, it might be stated that you and Martin were particular pals? A. Yes, sir. We went on numerous dates together, sir, and all during that time I have been very close to him.

Q. Did you have occasion to observe Martin as he grew up? A. Yes, sir. All during the time I have been with him he has always been a sickly kid.

Q. He has been a sickly boy? A. Yes, sir.

Q. Will you tell us briefly about that? A. Well, sir, we used to have a lot of athletic events and he didn't go in much for that, and then at the beaches in the summer—— 2480

Q. Melvin, you are talking very fast and I have difficulty following you. Will you slow up a little bit? A. Yes, sir.

Q. You have told us now about the athletic events in which he did not participate very much? A. He did not, yes, sir.

Q. What else did you notice about him? A. In the summer months we would visit the beach, sir, and his chest was caved in from rickets, sir, and I noticed it; it was very noticeable. He was shy from it. He didn't want anybody to notice it. He would try to hide it at times.

Q. He was sensitive about it, was he? A. Yes, sir, and about his health.

Q. What else, if anything, did you notice about his health as a growing boy? A. Well, all during the time he used 2481
to cough quite a bit, and as long as I have known him he has been a very sick kid; he has been sickly.

Q. He has been sickly? A. Yes, sir.

Q. Do you recall anything unusual at the time that you were both entering the service together? A. Yes, I did.

Q. Did you go down to enlist at the same time, yes or no? A. Yes, sir, we did.

Q. And where did you go to be physically examined? I suppose you were physically examined? A. Yes, sir.

Q. Where did you go for this examination? A. Grand Central Palace, New York.

Q. Grand Central Palace, New York? A. Yes, sir.

Q. And you and Martin went together? A. Yes, sir, we did, sir; with my uncle.

Q. And your uncle who? A. Uncle Samuel Bayer.

Q. He took the both of you down there? A. Yes, sir.

Q. How long were you there during the time of the examination? A. I would say about three hours, sir.

Q. And will you tell us very briefly what you observed while you were there? A. Yes, sir. We entered the building—just before entering the building Marty became very
2483 nervous at that time, sir, and he called me aside, and he said, "Melly, I am afraid that I won't pass the physical." And then we entered the building and he was behind me during the physical——

Mr. McGohey: If your Honor please, I refrained from offering any objection, but I do not see the materiality of any of this testimony, of what transpired there or what Martin Bayer said, or what Melvin Usdan said. Neither of these boys are on trial.

The Court: I do not think conversation between them is admissible.

Mr. Keenan: Your Honor, this is the first part of any conversation. It may go out by consent. May I proceed?

2484 Mr. McGohey: Now, if your Honor please, I press the objection as to any conversation. I have agreed with your Honor as to the latitude given up to now, but what Martin Bayer said or Melvin Usdan said has no materiality to this issue.

The Court: I will sustain an objection as to conversations, but I am going to permit him to testify as to what happened.

Q. What did you say happened there? A. I say that we entered the building, and about halfway through, Martin was behind me all the time, and I turned around——

Q. Was he right there in your presence? Did you see this with your own eyes? A. Yes, sir. He was right alongside of me at all times until I turned around and he wasn't behind me any longer. I just wondered about it, and I went back to look for him.

Mr. McGohey: I object to that.

Mr. Keenan: Strike out that he wondered.

Q. What else did you do? A. I went back to look for him, sir, and I saw him lying on the medical bench with a doctor beside him, and I heard a conversation with the doctor—— 2486

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Your Honor, I want to ask for the conversation between the doctor and Martin Bayer that this witness heard, because obviously we haven't Martin Bayer here.

The Court: I will let him testify.

Mr. McGohey: I object to it, your Honor.

The Court: What did the doctor say?

Q. Will you state it slowly because I cannot follow you. Please speak slowly? A. Yes, sir. He was standing by Martin Bayer and Martin was pleading with him to give him another chance, sir. It seemed like he had very high blood pressure and the doctor was going to turn him down right there. 2487

Q. Was that the conversation? A. Yes, sir. Here is how it went, sir: Martin was pleading, and he said, "Doc, I'll even bring you back a dead Jap if you let me pass through here." The doctor said "O.K., lay back and we will see what we can do for you."

Q. And did he lay down? A. Yes, sir, he laid down.

Q. How long did he rest there? A. I don't know, sir, because I had to go on with my physical, but I waited for him about two hours after that, sir, after I completed my physical.

Q. You waited for him to come out? A. Yes, sir.

Q. And you don't know what happened in that interim, from what you saw? A. No, sir, I don't.

Q. You do know that he was finally accepted? A. Yes, sir. He came to the desk where the clerk was at the rejection or O.K. table, who smiled up at him and said that it was stamped O.K.

2489 Q. Were you out at Mitchel Field with him? A. Yes, sir, I was.

Q. When you enlisted, where did you go first? A. I went to Camp Upton, New York, sir.

Q. Did Martin go with you? A. Yes, sir, he was along with me.

Q. That is, you had been pals and had gone around together, and you enlisted together and you went out to Camp Upton together? A. Yes, sir.

Q. After you were inducted into the service as soldiers? A. Yes, sir.

Q. How long were you at Camp Upton? A. Approximately a week, sir.

Q. And while you were at Camp Upton did you do what the other boys did as far as you could observe, like any
2490 other inductees? A. Yes, sir.

Mr. McGohey: I object to this, your Honor. I cannot see the materiality to the issue here.

Mr. Keenan: It is a little preliminary, your Honor. I will not trespass very long on this.

The Court: All right.

Q. After you left Camp Upton, where did you go? A. I went to Mitchel Field, New York, sir.

The Court: I am going to take a mid-afternoon recess. The court will take a ten-minute recess.

(Short recess.)

Q. I believe we got as far as the time when you left Camp Upton and went to Mitchel Field, is that right? A. Yes, sir.

Q. When you went to Mitchel Field, what task were you assigned to? A. I was assigned to the Basic Training Section of the Air Base Squadron, sir.

Q. Did you have any particular duties to perform there, or what was that like? A. We were to take basic training, sir, for the Army; to take the initial training, sir. 2492

Q. How much basic training did you have at Mitchel Field?

Mr. McGohey: I object to this, your Honor.

The Court: I will overrule the objection.

A. I had one week's basic training, sir.

Q. During all the time you were at Mitchel Field? A. Yes, sir.

Q. Getting ahead of our story for a minute, when you went from Mitchel Field you went to Westover Field? A. Yes, sir, that's right.

Q. How much basic training did you have at Westover Field? A. None at all, sir.

Q. And from Westover Field you went to Goldsboro? 2493
A. Yes, sir.

Q. How much basic training did you have there? A. None at all, sir.

Q. And from Goldsboro, after you were there a few days, you went to Wilmington, or to Newcastle, Delaware? A. Yes.

Q. To the Air Transport Corps? A. Command, sir.

Q. Air Transport Command? A. Yes, sir.

Q. And how much basic training did you have there? A. None at all, sir.

Q. And from there you went to Greensboro? A. Greensboro, North Carolina—O. R. D.—overseas replacement depot.

Q. Overseas replacement depot? A. Yes, sir.

Q. And how much basic training did you have there? A. I didn't have any at all, sir.

Q. And from there you went to the Arctic, to the Arctic Circle? A. Yes, sir. I went from there, sir, to the port of debarkation—embarkation, I am sorry.

Q. What? A. Port of embarkation.

2495 Q. And from there you went up to Greenland? A. Yes, sir.

Q. Now, what about your cousin Martin? Do you know how much basic training he had? A. Yes, sir.

Q. How much did he have? A. He had approximately two weeks, sir.

Q. All told? A. Yes, sir.

Q. And after you got through with the one week's basic training at Mitchel Field, at Headquarters Company, was it? A. It is First Air Base Squadron; headquarters of First Air Base Squadron.

Q. What did you do there after your one week's basic training? A. I was a file clerk, sir, at Base Headquarters of the 201 file section.

Q. 201 files? A. Yes, sir.

2496 Q. Who was your commanding officer? A. At that time, sir, I believe it was Captain Wood.

Q. Captain Wood? A. Yes, sir.

Q. And did you do the work, as far as you know, of any clerk out there, any soldier clerk? A. Yes, sir.

Q. Did you conform to the ordinary hours of duty? A. I did, sir.

Q. Did you have any weekends or any leaves of absence that were not in accordance with the regulations or of what the other boys did? A. I did not, sir.

Q. None whatsoever? A. None whatsoever, sir.

Q. May I ask you if you performed your work with the ordinary care and attention of other clerks out there that you could observe? A. Yes, sir, I did.

Q. Did you ever receive any disciplinary acts of any kind for neglect of duty of any kind? A. Not since I have been in the Army.

Q. Not since you have been in the Army? A. No, sir.

Q. By the way, have you received a good conduct medal? A. Yes, I have, sir.

Q. And a citation for that? A. Yes, sir.

Q. And how long were you at this base headquarters at Mitchel Field? A. I believe I was there—— 2498

Q. Under Captain Wood? A. I think about two months, sir; something like that; two or three months, approximately.

Q. During all that time did you do filing clerk's work? A. Yes, sir.

Q. And nothing else? A. Nothing else, sir.

Q. All day long? A. All day long, sir.

Q. And how about your cousin, Martin Bayer? A. He was working alongside of me, sir.

Q. Doing the same thing? A. Doing the same work, yes, sir.

Q. And what about him? Did you observe whether he had special treatment of any kind, nature or description? A. He did not, sir.

Q. Did he, the same as you, get up at the same hour 2499 in the morning as the other boys? A. Yes, we did, sir.

Q. And perform the same hours of duty and labors as other men in light work? A. We did, sir.

Q. And eat the same food? A. Yes, sir.

Q. And conform to the same regulations? A. We did, sir.

Q. Now, after two or three months, you were transferred to where? A. After two or three months I was

transferred to the First Fighter Command, Mitchel Field, New York.

Q. To the First Fighter Command, Mitchel Field, New York? A. Yes, sir.

Q. Do you know anything about that organization from your own observation? A. It controlled the fighter planes for the protection of the East Coast, sir.

Q. That was its job, was it? A. Yes, sir.

Q. And that first job to which you were assigned at the base headquarters—those headquarters remain there, do they, or do they change to another field? A. No, they are there today, sir.

2501 Q. They are there today? A. Yes, sir.

Q. When you went to the headquarters of the Fighter Command, did you make out an application for a transfer, do you recall? A. I did not, sir.

Q. Do you know anything about that? A. No, sir.

Q. You know you were transferred to the Fighter Command? A. Yes, sir.

Q. And during the time that you were at the Base Headquarters did you know Major Boebel? A. I knew him; I knew of him, sir. I didn't know him personally.

Q. You did not know him personally? A. No, sir, I did not.

Q. Would you have any conversation with these Colonels in the Army? A. No, sir, I do my work as an enlisted man, the same as anybody else did.

2502 Q. Was it the custom and habit of enlisted men to have to do with one another and have very little conversations with officers except with sergeants? A. Yes, sir.

Q. By the way, did you ever have any information from any sergeant that you were soldiering on the job and not doing your work efficiently or faithfully? A. No, sir. I had the opinion the other way around, sir.

Q. And as far as you know, Melvin, no one ever complained that you know of to you of your job? A. Nobody has ever, sir.

Q. Who was your commanding officer at the First Fighter Command there? A. At the First Fighter Squadron, sir, Captain Radovich.

Q. And did you know him before you went into that Command? A. I did not, sir.

Q. Did you ever hear of him? A. No, sir.

Q. Was he your immediate boss? A. No, sir, he was not.

Q. What officer was more immediate than Captain Radovich? A. Lieutenant Roeser.

Q. Lieutenant Roeser, is that right? A. Yes, sir.

Q. And did you work close to him? A. Side by side, sir. 2504

Q. Side by side? A. Yes, sir.

Q. What was your job at the Fighter Command? A. As a clerk, sir, doing the typing and filing.

Q. As a clerk? A. Yes, sir.

Q. Doing typing and filing? A. Yes, sir.

Q. What about Martin? A. He was doing the same work, sir.

Q. Was he transferred all the time the same as you were, and at the same time? A. Up to that point, sir, he was. Not through all my Army career, sir.

Q. Not all through, but up to that time? A. Yes, sir.

Q. Who else worked around for Lieutenant Roeser doing clerk work? A. Well, sir, up until about a week or so before I was transferred there were the two of us, sir, and after that Lieutenant Roeser had a friend, I believe, 2505 brought in there to work with him, and he had a girl friend of his, I believe, to come to work for him.

Q. And starting at the beginning, how many clerks did Lieutenant Roeser have when you and Martin first went in and were assigned to him? A. Two, sir.

Q. Two in addition to you? A. No, sir, we were the only two.

Q. I mean before you were assigned. A. None at all, sir.

Q. And after you came there was another individual, a man, a soldier? A. A soldier, yes, sir.

Q. An enlisted man? A. Yes, sir.

Q. And I believe you said that he was a friend of Lieutenant Roeser? A. Yes, sir.

Q. And do you know how he happened to get there? A. No, sir, but I know that in civilian life he spoke with him quite often, and he came down to see him, and after he enlisted in the Army he came to work with us.

Q. And he did clerk's work too? A. Yes.

2507 Q. And then came the young lady? A. Yes, sir.

Q. Do you happen to remember her name? A. No, I don't.

Mr. McGohey: I object to this, your Honor. I do not see the materiality of this.

Mr. Keenan: Your Honor, we intend to prove that one of the reasons that this boy was transferred——

Mr. McGohey: I object, your Honor.

Mr. Keenan: Does your Honor hold that he cannot answer that question or do you overrule it or sustain it?

The Court: I haven't got to it.

Mr. Keenan: I beg your pardon.

The Court: As a matter of fact I forgot what the
2508 question was. I think it was a question of what the lady's name was.

Mr. Keenan: If he knew what the lady's name was.

The Court: All right. I sustain the objection to it.

Q. What did the young lady do there?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection to that.

Mr. Keenan: I want an offer of proof on that, your Honor.

The Court: All right.

(The following took place at the bench not within the hearing of the jury:)

Mr. Keenan: I want and offer to prove, if permitted to answer, the witness would show that the young lady was a civilian and a friend of Lieutenant Roeser's, who had been in other parts of the country and was brought up from other parts of the United States through the efforts of Lieutenant Roeser, and brought out to that field, and that a job was made there for her; and that one of the reasons, if not the 2510
predominant reason, that he was transferred to the medical detachment was by reason of the fact that they wanted to keep the position for this young lady, and that the young lady being there, there was no longer any need for him.

The Court: I think that is material.

Mr. McGohey: The evidence now shows that the transfer out of the First Fighter Command to the hospital was at the request of this young man.

The Court: But he has testified to the contrary. I am going to admit the testimony.

Mr. McGohey: I do not believe even on the testimony offered here that it is material, your Honor.

The Court: I do not think it is a matter of great importance, but my idea is that there has been some 2511
testimony that he was transferred to the medical command at their request and for the purpose of getting a softer job.

Mr. McGohey: And the order so shows.

Mr. Keenan: It shows for a softer job?

Mr. McGohey: No, the order shows that it was at his request.

The Court: If he has any proof to the contrary, I think he is entitled to show it.

Mr. McGohey: But the order shows it was at his request.

Mr. Keenan: I am not going to be bound by any of these orders.

The Court: I will overrule the objection and let him testify. Go ahead.

(The following took place before the jury:)

Mr. Keenan: I will reframe the question and ask another one.

2513 Q. Do you know whether he had known her before she whether or not there was work enough for you after the young lady came there? A. No, there was hardly any work when we first started to work there, and when two other people came to work there was nothing at all to do.

Q. So when the young lady came there, there was nothing to do whatsoever? A. Yes, sir.

Q. Do you know who brought the young lady out there? A. Yes, sir.

Q. Who was it? A. Lieutenant Roeser.

Q. Were you there and did you hear conversations between them frequently? A. Yes, sir.

Q. Do you know whether or not the work continued or came there? A. Yes, sir, she did.

2514 Mr. McGohey: I object to this, your Honor.

The Court: On the ground that it is hearsay, I think it is objectionable.

Mr. Keenan: Exception.

Q. How long were you in the clerk's office at the First Fighter Command? A. I was there about four months, sir.

Q. And did you obey every order you got? A. Yes, sir.

Q. Were you permitted to have leaves of absence?

The Court: You asked him that question.

Mr. Keenan: Wait a minute, your Honor. I intended to cover this examination as thorough as I know how. I thought I had covered it up to the time of the Fighter Command, but if your answer would be the same during all the time you were in the Army, wherever you were, I shall not press it.

The Witness: Yes, sir, it was the same throughout my Army career.

Q. And the same with Martin? A. Yes, sir. 2516

Q. During all the time he was at Mitchel Field? A. Yes, sir.

Q. And all the time he was at Westover Field? A. And Delaware.

Q. And at Delaware? A. Yes, sir.

Q. During the time that you were at the First Fighter Command did you know Major Radovich? A. I knew him as my C. O., sir.

Q. Did you have conversations with him other than those in line of your work and duty? A. No, sir.

Q. Did you know him differently—I shall ask you the broad question—than any other commanding officer that you had? A. No.

Q. Did he ever give you any favors of any kind that you could observe or any special consideration? A. No, sir. 2517

Q. Did he treat you, as far as you could observe, any differently than he treated anyone else in his company? A. Not any different, sir.

Q. Did you know him intimately? A. No, I did not.

Q. How did you address him? A. As "Sir", as "Captain".

Q. How did he address you? A. Corporal, or private at that time, sir.

Q. And how about your cousin Martin—I am asking you because he is not present in the court room. A. Yes, sir.

Q. Did you observe what his relations were with Captain Radovich? A. Not any different than mine, sir.

Q. And was he singled out for any unusual orders or treatment that you could see in any way? A. No, sir, not at all.

Q. And when you were transferred to the medical detachment, how long did you stay there? A. I stayed there about a week, sir. I worked night and day there that week.

Q. Tell us about that. You have told us that there
2519 wasn't much to do particularly after the young lady came to the Fighter Command? A. Yes, sir.

Q. Now, what about when you got to the medical detachment, what did you do there? A. I worked as a clerk also, sir, and they seemed to be shorthanded at that time, and I worked at nights and days, sir.

Q. You worked nights and days? A. Yes, sir.

Q. Prior to your going to the medical detachment, did you work nights? A. No, I did not, sir.

Q. And how about Martin? A. He did not.

Q. And how about him, after he got to the medical detachment? A. He worked nights also, sir.

Q. And were you busy in that way the whole week that you were there? A. Yes, sir.

Q. Did you receive any special consideration or differ-
2520 ent treatment than other persons there? A. No, sir, we did not.

Q. And then what happened after you were there a week at the medical detachment at Mitchel Field? A. We were shipped out on orders—I went to Westover Field, Massachusetts, and Martin went to Bradley Field, Connecticut.

Q. Up to that time, up to the time you got to Westover Field, had you had a gun in your hand at all? A. No, I did not.

Q. Or a pistol? A. No, sir.

Q. Had you had any training of that nature at all? A. No, I did not.

Q. Had you done any marching or drilling out at Mitchel Field? A. I believe there was only one day of it, sir.

Q. One day of drilling or marching? A. Yes, sir.

Q. Otherwise you worked as a clerk would work downtown in an office? A. That's right, sir.

Q. And when you got to Westover Field what was the company to which you were assigned? A. I was originally assigned—I don't recall the number of the company there but it was an engineers airborne division.

Q. Engineers airborne division? A. Yes, sir. 2522

Q. At Westover Field? A. Yes, sir.

Q. That company to which you were assigned, what was its destination? A. It was ready to leave the next day for overseas, sir.

Q. Did you leave the next day for overseas? A. No, sir. There was some bit of a mixup of orders and another boy replaced me before I got there.

Q. Then what happened? A. Then I was placed into another outfit, 881st Airborne Engineers, also a medical detachment, sir.

Q. Medical detachment where? A. At Westover Field, Massachusetts.

Q. Were you transferred to the medical detachment at Westover Field with the first outfit you were sent to? A. 2523
No, sir, that was not the first outfit I was sent to. I was sent first to this outfit that was leaving the next day.

Q. You don't remember the number of that? A. No, sir. I don't recall the number.

Q. But were you to be a medical clerk in that outfit? A. Yes, sir.

Q. Had you had any training at all, of parachute equipment or anything of that nature? A. I did not.

Q. But you had had your hands on parachutes? A. No, sir, I was never in a plane.

Q. Never had been in a plane? A. No, sir.

Q. They had shipped you there to go out the next day overseas? A. Yes, sir.

Q. And someone else took your place in a mixup out there at Westover Field? A. Yes, sir.

Q. And as a result of that you were assigned to some other outfit? A. Yes.

Q. What outfit was that? A. 881st Airborne Engineers, Medical Detachment.

Q. Can you tell us about when that was? I think we have
2525 the accurate records and probably can help you. A. I wish you would help me, sir; I have been in so many outfits.

Q. About the 19th, 20th of August, 1943? A. Yes, sir, approximately that.

Q. Is that right? A. Yes, sir.

Q. And what was your next—while you were there were you busy? A. Very busy, sir.

Q. Somewhat different from Mitchel Field? A. Yes, sir. We were training airborne engineers in the outfit I was put into, we were giving basic training to these volunteers for airborne engineers.

Mr. McGohey: May I have that answer read.

(Answer read.)

2526

Q. What kind of training were you giving? A. Given, sir, or giving?

Q. Giving. A. None at all, sir. I wasn't; I was in—I was working in the medical detachment and I took care of the first aid.

Q. But in this record, Melvin, as it is taken down, did I understand you correctly, you said you were giving—

A. Well, the outfit itself was designated to give training, and the medical detachment was part of the outfit, sir.

Q. Were you giving training to someone else there? A. No, sir, I was not.

Q. But you were busy there, were you? A. Yes, sir, we were, sir.

Q. And was your work interesting? A. It was interesting, sir, yes.

Q. How about Martin, was he there with you? A. No, sir, he was not.

Q. Where did they send Martin to? A. Bradley Field, Connecticut.

Q. How long was he at Bradley Field, Connecticut? A. 2528
About two months, sir.

Q. Was that the same type of outfit you were sent to? A. Yes.

Mr. McGohey: I object to that. The witness testified that it was a different field.

The Court: Overruled.

Mr. Keenan: Is there really a contention that there was any difference? We are under a handicap——

Mr. McGohey: I object to this, and I ask——

Mr. Keenan: He is out in India where we can't get him.

Mr. McGohey: I object to any speeches by counsel as to why he is asking questions. The witness testified that he was at one field and the other boy was at 2529
another field.

Mr. Keenan: I will ask the question:

Q. Do you know what organization Martin was sent to? A. Yes. The same type of organization as mine except a different number it had.

Q. Did he eventually come to Westover Field? A. His outfit moved up there, sir.

Q. Do you happen to know what it was? A. 1921 Airborne Engineers, Medical Detachment.

Q. 1921 Airborne Engineers, Medical Department, is that right? A. Yes, sir.

Q. That was moved up to— A. Westover Field, Massachusetts.

Q. The 881st that you had joined, was that ready for overseas? A. Not at all, sir.

Q. Was it alerted at any time that you were there? A. No, sir, it never was.

Q. You would know that, wouldn't you? A. I would, sir.

Q. Were you transferred from Westover Field to the
2531 commando outfit down in Goldsboro? A. Up until that time——

Q. May I repeat the question. Were you sent to Goldsboro from Westover Field? A. Yes, sir.

Q. To join some project? A. Some project number, sir; I don't remember the number.

Q. The commandos. You know what it was now, don't you? A. I found out afterwards.

Q. That was the commando force that was to go over there, fly over behind the Japanese lines, is that right? A. I have heard about that, yes, sir.

Q. By the way, when you got down to Goldsboro to join that commando outfit, did they give you any equipment? A. Yes. They gave me a 45 pistol, sir.

Q. Did you ever have one in your hand before? A. No,
2532 sir, I never had, sir.

Q. At Westover Field how big was the unit you were in, the 881st; any idea of that? A. About 500 men, sir.

Q. And I believe I have asked you if it was alerted, and I am particularly emphasizing whether it was alerted, to go overseas at the time that you received your notice of transfer to Goldsboro? A. It was alerted.

Q. Do you know what the full strength of the outfit would be? A. Well, when I say approximately 500, the full

strength would be 500, I think, sir, but we were under strength at that time.

Q. Was your strength being built up or diminishing? A. Well, sir, in my detachment there were originally 26 men and when I left there there was only 7 left.

Q. So that if the outfit as such was alerted to go overseas it was going over with a skeleton outfit? A. Yes, sir.

Mr. McGohey: I object to that, your Honor.

The Court: I think that is a conclusion and improper.

Mr. McGohey: I move to strike it out.

The Court: Strike it out. 2534

Q. In any event, there were 25 in your immediate outfit when you went there?

Mr. McGohey: I submit we have this.

Mr. Keenan: I think it is very important. I don't understand why the United States Attorney doesn't want to emphasize it.

Mr. McGohey: I move to strike that out.

The Court: You may argue your case when the time comes. But these clashes—strike out the comment.

Mr. Keenan: I will ask the question, your Honor—

The Court: He said there were 26 men when he got in it and when he left there were seven.

2535

Q. There were seven? A. Yes, sir.

The Court: What is the next question?

Q. Now, do you know whether or not that diminishing proportion went on through the whole 881st Engineers?

Mr. McGohey: I object.

Q. (Continuing) Was that unusual for the particular group you were in?

Mr. McGohey: I object to that, your Honor. It is immaterial.

The Court: I overrule the objection.

A. It was unusual. They were breaking up the outfit to my knowledge at the time.

Q. When you say "the outfit", what outfit are you talking about? A. The 881st Airborne Engineers.

Q. How much notice did you get that you were being shipped out of Westover Field to go down to Goldsboro?
2537 A. About 12 hours, sir.

Q. Did you get a chance to go home? A. No, sir, we did not.

Q. How much notice did your cousin, Martin, get? A. The same amount of time, sir.

Q. Was anybody else shipped out of that field at Westover Field besides yourself and Martin, that you know of, to make that trip? A. No, sir. We were the only two.

Q. How many soldiers were there at Westover Field, about, at that time? A. I would say about 30,000, sir.

Q. About 30,000? A. Yes, sir.

Q. Had you had any training of any special type for overseas? A. No, sir, I did not receive any special training.

2538 Q. And what was the physical condition of your cousin Martin that you described at that time? A. Well, sir——

Mr. McGohey: I object.

Q. As you observed.

Mr. McGohey: It appears from the testimony that they were at different fields.

Mr. Keenan: After he got to Westover.

A. Yes, sir. During that time, sir, he always coughed a lot, sir, and he coughed violently at that time, I remember him particularly, and he spat up blood at that time. And that——

Q. Did you see that? A. Yes, sir. I asked him, questioned him about it——

Q. No. You will not be permitted to tell the conversation about it.

Now, do you know what happened to him when he got to Greensboro?

The Court: Goldsboro.
Mr. McGohey: Goldsboro. 2540
Mr. Keenan: No. Greensboro, your Honor.
The Court: All right, you ask the question.

Q. Do you know it? A. Yes, sir, I do. I found out through a letter. But while he was down there he was coughing up quite a bit; also, before I went overseas I meant to say something to somebody before I went overseas, but they pulled out too fast before I could. And I understand he got double pneumonia.

Q. He got double pneumonia? A. Yes, sir.

Q. That is, before he went overseas? A. Yes, sir.

Q. Before he went over to Burma? A. Yes, sir.

Mr. McGohey: Will you fix the date of that?

2541

Q. What was the date of that? The United States Attorney wants to know. A. I don't recall, sir, the exact date. It was about August 5th, something like that.

Mr. McGohey: Of what year?
The Witness: 1944, sir.
Mr. Robb: What is the date?
Mr. Keenan: August 5, 1944.

Q. That is when you——

Mr. McGohey: Your Honor, I move to strike that out.

The Court: I overrule the motion. But you may cross-examine.

Q. Now, did you know that you were going to Goldsboro to the commando outfit before you received this 12-hour notice? A. I did not.

Q. Did you have any intimation of any kind from anyone? A. No idea at all.

2543 Q. Did you hear from Captain Radovich? A. No, sir.

Q. How long since you had seen Captain Radovich before you went down to Goldsboro? A. About six months I would say, sir. I don't remember the——

Q. Had you talked to him? A. No, sir, I never did.

Q. Or got any letters from him? A. Never did.

Q. Or communication from him? A. Never did.

Q. Then, when you got down to Goldsboro did you have a talk, a conversation with Colonel Boebel? A. No, sir, I never did, sir.

Q. And did you tell Colonel Boebel that you were sent down there by Captain Radovich? A. I never spoke to the Major down there. I spoke to an enlisted man, sir.

Q. Whom did you report to when you got to Goldsboro? A. The sergeant in charge, which I always do in any place
2544 where I go.

Q. What did the sergeant tell you to do? A. Report to the barracks, sir.

Q. Did you report to the barracks? A. Yes, sir.

Q. Did you see Captain Radovich there? A. Not that I recall, sir.

Q. You don't know whether he was or was not there? A. That is right, sir.

Q. But you don't recall having seen him at all? A. That is right.

Q. Therefore I will ask you, do you recall having spoken to him? A. Never, sir.

Q. At Goldsboro? A. No, sir.

Q. And, as far as you recall, if Lieutenant-Colonel Boebel says that you told him that Captain Radovich sent you down there, he is mistaken about that? A. I never said anything like that, sir.

Q. Or never talked to him? A. I never spoke to him at all.

Q. Do you remember whether you saw him around there? A. No, I did not, sir. 2546

Q. Were you on any social terms of speaking with Lieutenant-Colonel Boebel? A. I did not, sir. I did not have anything to do with him at all, sir, at any time at all.

Q. Did he have anything to do with you? A. No, sir.

Q. How about Captain Kogan, do you know him; had you seen him when he was a sergeant? A. No, sir.

Q. How long were you at Goldsboro? A. At Goldsboro, about a week, sir.

Q. You left apparently to go some place else. Where was that? A. To be shipped to Newcastle Army Air Base, Air Transport Command.

Q. What did you do there? A. I worked——

Q. Wait a minute. Was that pursuant to some order that you got? A. Yes, sir, special order came out, like a regular order that usually comes out. 2547

Q. Who told you about it? A. The sergeant, sir.

Q. And when the sergeant spoke to you and told you to go you moved? A. Yes, sir.

Q. And that was your habit, usually? A. Yes, sir.

Q. Sergeants were that way? A. Yes, sir.

Q. When you got to Wilmington, Delaware, what kind of work did you do there? A. I was working in the message center, on secret and confidential work, sir.

Q. Were you busy there? A. Yes, sir, we were.

Q. Was Martin there with you? A. He did not work with me, sir; he was in a different outfit, but he was there at the same field.

Q. On the same field but with a different outfit? A. Yes, sir.

Q. What kind of work did he do, if you know? A. He worked in the file section.

Q. On the file section? A. Yes, sir.

Q. Have you any knowledge of your own about how you happened to be transferred from Westover to Goldsboro? A. Not at all, sir.

2549 Q. Or from Goldsboro to Wilmington, or Newcastle? A. I didn't at that time, sir.

Q. You have read the papers and of course you have heard of this matter that is pending in this courtroom? A. That is right, sir.

Q. May I ask you when you first saw me? A. Monday evening, sir, when you called me in to speak to you.

Q. You had never seen me before Monday evening? A. No, sir, I never did.

Q. Do you know how you happened to come back to this country this particular time? A. I had a recuperation furlough, temporary duty in the United States. I should say that is given to all the boys returning from overseas, from this outpost, from the Arctic Circle, an isolated place.

2550 Q. You were up at an isolated place at the Arctic Circle? A. Yes, sir.

Q. Pretty cold up there? A. Yes, sir.

Q. You were glad to get home? A. I certainly was, yes, sir, with my wife.

The Court: Do you wish to cross-examine?

Mr. McGohey: Do you want me to start now, your Honor?

The Court: Yes.

*Cross-examination by Mr. McGohey.*

Q. Melvin— A. Yes, sir.

Q. —when you were ordered out of—where was it? Bradley Field you were or Westover? A. Westover Field, Massachusetts.

Q. Westover you were at? A. Yes, sir.

Q. When you got your order to leave Westover Field, I think you told us that you got short notice? A. About twelve hours, sir. It was less than that, I would say, even.

Q. Sir? A. I would even say it was less than that.

Q. What do you mean by that, that from the time you were told you were leaving you were given twelve hours to 2552
get out of Westover Field? A. No, sir; we were in the process to leave for overseas in that twelve hours; I left the field within twelve hours, sir.

Q. That is what I mean. From the time you were first told you were going you got twelve hours in order to get out of the field? A. Yes, sir.

Q. And at the end of that twelve hours did you leave the field? A. Yes, sir.

Q. How did you go down to Goldsboro? How did you travel? A. By train, sir.

Q. And where did you take the train? A. I took the train—I have forgotten the name of the town, sir; it is right near Westover Field, Massachusets. I have forgotten it, sir.

Q. How long were you at this field, Melvin? A. I was 2553
there about 3½ months, sir, I would say.

Q. During that time did you have some passes to go to the town? A. The same as anybody else.

Q. Well, yes, certainly. And in the ordinary course of your duties you got your passes, like any good soldier would get? A. That is right, sir.

Q. Did you go into town? A. Yes, sir.

Q. How many times did you go into town? A. I don't recall the amount, sir.

Q. Would you say you went on an average of three times a week? A. No, sir. I might get a night pass about three times a week, sir.

Q. Where would you go when you got a night pass? A. To Westover.

Q. Was that the town? A. Yes, sir. Holyoke. I am sorry. It was Holyoke; that is not the place where I took the train, sir. Holyoke was near there.

Q. Holyoke was nearer to the field? A. Yes, sir.

Q. That is where you would go on your passes? A.
2555 Yes, sir.

Q. Is Holyoke the place where you took the train? A. No, sir. It was a larger town.

Q. Were you ever in the town before the time you went there to get out the train? A. Yes, sir.

Q. How many times were you there? A. A couple of times when I went home, sir.

Q. You don't remember it? A. No, sir, I don't.

Q. How far from the field was it? A. It was—I would say about thirty miles—no, I don't say that. About twenty miles, twenty-two, twenty-two, thirty miles.

Q. How did you get from the field to the train? A. They had buses there.

Q. When you got these orders you went to this town and
2556 got on the train? A. No, sir. Army transportation took me to the train, sir, by truck.

Q. In any event, in some mode of conveyance you got to this town? A. Yes, sir.

Q. What itme of day was it? A. It must have been about 4 o'clock in the afternoon; I don't recall the time, sir.

Q. How long did it take you to go from that town to Goldsboro? A. I left that afternoon and arrived in Goldsboro the following evening, I believe, sir; about a whole day.

2557

Q. Would you say it was about twenty-four hours? A. I would say that, yes, sir, about that. I don't recall, though, how long it was.

Q. Do you recall the date on which you got those orders? A. No, I don't, sir.

Q. If I showed you the order would that refresh your recollection, Melvin? A. It might, sir.

Q. Would you take a look at this? This is Government's Exhibit 3. A. I don't recall it saying "proper time." I don't recall the orders directly, but I know the "proper time"—I don't remember seeing it, sir.

Q. Were you given a copy of these orders? A. Yes, sir, I was.

2558

Q. You looked at them, of course? A. Yes, but——

Q. Did you look at them? A. Yes, sir, I did.

Q. Will you look at the date of these orders on this copy that I show you here? That date there is 22 November, 1943? A. Right, sir.

Q. Does that refresh your recollection as to the time at which you got your orders? A. I don't know, sir, if it is true or not, because I don't remember——

Mr. McGohey: I move to strike that out, your Honor.

Q. I just— A. I am sorry, sir.

Q. You and I will get along all right; don't try to go too quickly. A. I am sorry, sir.

2559

Q. What I asked you is, does that refresh your recollection as to the date on which you were ordered to leave Westover Field and go to Goldsboro? A. No, it does not, sir.

Q. Well, in any event it is your present recollection is it, that you left there some time in the afternoon of whatever day you got your orders? A. Yes, sir.

Q. And that you traveled all that afternoon and that night? A. Yes, sir. We slept on the train.

Q. You say "we slept on the train." Whom do you include in "we"? A. Martin and I, sir. We were the only two on the orders. I was in charge of the trip, sir.

Q. Were you at the same field with him? A. Well, his outfit moved up after two months at Bradley Field to Westover Field, Massachusetts, sir.

Q. So that at the time you got your orders to leave he was at the same field you were? A. In the same field in a different outfit.

Q. You traveled together from the field in and got the
2561 train together? A. We were called in by the headquarters at the field and put on the same orders and we were given the orders together and told to go together.

Q. You traveled together all the time? A. Yes, sir.

Q. Then you slept on the train? A. Yes, sir.

Q. Your recollection is that it was some time late the next afternoon or some time the following afternoon—A. Yes, sir. But while we were on our way here we had about a two-hour layover in New York, and I called my mother and Marty called his folks and they came down to see us.

Q. Did you change trains at New York? A. Yes, sir, we did.

Q. When you got to New York what time was it, do you recall? A. Maybe about 7 o'clock, sir, something like that.

2562 Q. 7 o'clock in the morning? A. P. M., sir.

Q. 7 P. M. of the same day that you left Westover? A. Yes, sir.

Q. What train did you come down on, by the way? A. I don't remember. It is Grand Central Terminal we came into, sir.

Q. You came into Grand Central Terminal? A. Yes, sir.

Q. Then from what terminal did you leave going to Goldsboro? A. I think we left Pennsylvania, sir.

Q. Where was it that you met your folks and Martin met his? A. We called them and they came in, sir.

Q. Where was it that you met them? A. At the Grand Central, I believe it was.

Q. You called at the Grand Central for them? A. Yes, sir.

Q. Where was it? Where did you make the telephone call? A. At the station, sir.

Q. When you got into New York? A. Yes, sir.

Q. And then you waited there for them? A. Yes, sir.

Q. Did you have dinner together? A. Yes, sir, the folks did, sir.

Q. All of them, you and Martin and your relatives? A. Yes, sir; and my wife, sir.

Q. Your wife? A. Yes, sir.

Mr. McGohey: Would your Honor excuse me for just a second here, please?

The Court: Let me make the inquiry, have you considerably more?

Mr. McGohey: Yes, your Honor, I have.

The Court: We will take an adjournment then until tomorrow morning.

(To the witness) Let me admonish you that you have started to testify and have not finished, and between now and tomorrow morning, until it is completed, do not discuss your testimony with anybody.

The Witness: Yes, sir.

The Court: Don't talk about the case or discuss it with anybody.

The Witness: Yes, sir.

The Court: All right. Adjournment until 10.30 tomorrow morning.

(Adjourned to Thursday, October 18, 1945, at 10.30 A. M.)

New York, October 18, 1945,
10.30 A. M.

TRIAL RESUMED.

Mr. McGohey: Melvin, will you take the stand, please.

MELVIN USDAN resumed the stand.

*Cross-examination (continued) by Mr. McGohey.*

2567 Q. When we suspended yesterday afternoon, Melvin, you remember we were talking about the time that you and Martin Bayer left Bradley or Westover, whichever field it was, and went to Goldsboro? A. Yes, sir.

Q. Were you a corporal at that time? A. Yes, sir.

Q. And you were in charge of the detail in travel? A. I was given field orders, yes, sir, except for one special order——

Q. Melvin, please do not be nervous now and try to keep your voice up loud enough so that everybody back here at this last table can hear you and the last lady here in the jury box can hear you. Will you do that, please? A. Yes, sir.

Mr. McGohey: May I have the last question read?

2568 (Question read.)

Q. What was the special order? A. Instructing us to go to Goldsboro, North Carolina.

Q. And did that order tell you when you were to report there? A. We were given transportation by the Government, sir, and it was immediate.

Q. I do not think that is quite responsive. Maybe you misunderstood my question. You got a special order? A. Yes, sir.

Q. Directing you to go to Goldsboro? A. Yes, sir. Immediately.

Q. Did that order specify when? Did it give you any date that you were to arrive at Goldsboro? A. I believe it did, sir. We are told to go right down there. I don't recall the date, sir.

Q. During the time that you were in the Army, you got passes from time to time, like other boys did, did you not? A. Yes, sir.

Q. Did you sometimes get week-end passes? A. Once in a while, yes, sir.

Q. In the regular course. And when you got a week-end pass you would leave the station some time on Saturday morning, probably, would you? 2570 A. No, sir; you leave at night, when the pass started.

Q. Your pass would start at night? A. Yes, sir; after your day's work.

Q. Suppose you had a week-end pass, when you were at Bradley Field, for instance— A. I wasn't at Bradley Field, sir.

Q. Well, at Westover. A. Yes, Westover, sir.

Q. When would that pass start? A. It would start about 5.30, I believe, sir.

Q. When would you have to report back on a week-end pass? A. I would have to report back—well, sir, you never received a week-end pass; you received a two-day pass or a three-day pass or a one-day pass. 2571

Q. Was there ever an occasion when you had three-day pass? A. I don't believe I ever had one at Westover Field, sir.

Q. At any time while you were in the Army did you ever have a three-day pass? A. Yes, sir.

Q. And you would use the three days, would you not? A. Yes, sir.

Q. You would get back on time, would you not? A. Yes, sir.

Q. You would not get back late? A. No, sir.

Q. Were you ever a.w.o.l.? A. No, sir, I wasn't.

Q. You would not get back late? A. No, sir.

Q. Would you get back ahead of your pass, ahead of the time? A. I usually did, yes, sir.

Q. How long ahead of the time? A. About half an hour, I would say.

Q. About half an hour? A. Yes, sir.

Q. So that you wanted to be sure that you are always in on time and that you kept up your record? A. Yes, sir.

Q. It would be about an hour or a half hour ahead of
2573 reporting time that you would get there? A. Yes, sir.

Q. Did you ever have a pass for a longer period than three days? A. I never had a pass for a longer period than three days, sir; not an authorized pass for seventy-two hours.

Q. Were you married all the time that you were in the Army, Melvin? A. No, sir, I was not.

Q. When did you get married? A. June 11th of 1944—of 1943.

Q. 1943? A. Yes, sir.

Q. After you got married, any time that you could get a pass I assume that you would come home to see your wife? A. At Delaware, sir, you were allowed to live off the post if you were married.

Q. Prior to that time, let us take the time in June, 1943.
2574 Where were you stationed? A. At Delaware, sir.

Q. In 1943? A. That is right. If I get the year straight, I believe——

Q. In June, 1943, you were at Mitchel Field, were you not? A. I want to straighten out my date. I am all mixed up, I have been so many places, and I don't get the dates clear. I have been married 16 months, sir.

Q. Wait a minute, let me see if I can help you. You went into the Army in December, 1942? A. That is right, sir.

Q. You were first at Camp Upton? A. That is right, sir.

Q. Martin was with you at Camp Upton, was he not? A. That is right, sir.

Q. When you left Camp Upton you came to Mitchel Field? A. Yes, sir.

Q. Martin came with you, did he not? A. Yes, sir.

Q. When you were at Mitchel Field you were first assigned to the base, is that right? A. The Base Squadron, yes, sir.

Q. Doing clerical work there? A. Not immediately, sir.

Q. I don't hear you, Melvin? A. Not immediately, sir.

Q. What did you do when you first went there? A. I was assigned to the Basic Training Center—Section, I am sorry. 2576
Basic Training Section of the air base squadron for basic training in the Army.

Q. Was Martin Bayer there with you at that time? A. Yes, sir.

Q. Some time subsequent to that, however, you did come into the base headquarters, did you not? A. Yes, a short while after, yes.

Q. You and Martin were there together? A. That is right, sir.

Q. That was in 1943, wasn't it? A. Yes, sir. That was part of 1942. Let's see, now, sir. I believe about a week before, in 1942, something like that.

Q. We are trying to figure out 1943. Now, in 1943, in the early part of that year, you were working as a clerk 2577
at the base, at base headquarters at Mitchel Field, were you not? A. That is right, sir.

Q. Martin Bayer was working with you? A. That is right, sir.

Q. Were you working together? A. Yes, sir.

Q. Then some time later in 1943 you were transferred to the First Fighter Command, were you not? A. That is right.

Q. That was in 1943. Then later on you were transferred—by the way, when you were transferred to the First Fighter Command Martin was transferred with you, was he not? A. Yes, sir.

Q. At the same time? A. Yes, sir.

Q. On the same orders? A. I don't remember if I ever saw the orders. If you are on the field I don't believe you get a copy of the orders.

Q. Well, you left the base and came to the First Fighter Command together at the same time? A. Yes, sir.

Q. Then you left the First Fighter Command and were transferred to the Medical Detachment at Mitchel Field
2579 at Santini Hospital, were you not? A. No, I was not transferred to the Santini, sir. It was right on the field, the base hospital, and they had a section in Santini also.

Q. You were transferred, however, from the First Fighter Command to the Medical Department at Mitchel Field, is that correct? A. That is correct.

Q. Martin was transferred with you at the same time, was he not? A. That is right.

Q. To get back to the question that we were talking about, l[redacted]es: Now, during 1943 you got some leaves, did you no[redacted] much as three days at times? A. I think I might have received one, sir.

Q. At least you got as many as you were entitled to get or as you could get, is that so? A. That is right.

Q. And, like any other boy, you wanted to see your parents
2580 and you wanted to see your wife, and you took as much time as you were entitled to have under the regulations? A. That is right, sir.

Q. Now— A. Pardon me, sir. Could I say something?

Q. Yes. A. Yesterday I said something about a phone call that I made in New York. I was a little mixed up. Did I say in New York that I made the phone call before I came?

Q. My recollection is that you said you came down to New York from Westover— A. Yes, sir.

Q. —and that when you got into New York, you and Martin, that you made a phone call to your parents from Grand Central Station. That is my recollection of what you said. A. I mixed myself up there, sir. I believe I made the phone call from Westover Field, sir.

Q. Whom did you call? A. I called my wife and my mother, sir.

Q. You called your wife and your mother? A. She wasn't my wife at the time. I was engaged, sir. My wife, she was at school at that time. I called her at school. I remember that, sir. 2582

Q. Melvin, please keep your voice up good and loud now, because everybody back here wants to hear you; just try and talk a little more slowly. A. Yes. She was at college at that time, and I called her there, and I called my mother at home.

Q. Do you know whether Martin made a call at Westover Field? A. I believe he did, sir.

Q. Do you know whom he called? A. His folks.

Q. His folks? A. Yes.

Q. You told them I suppose that you were coming to New York? A. No—well, we told them we would pass through, yes, sir.

Q. That is what I say, passing through. A. Yes.

Q. Did you ask them to meet you? A. We asked them if they could, yes, sir, if it was possible. 2583

Q. And they did? A. Yes.

Q. Now, do you recall when it was that you got down to New York? A. Sir, I think it was—I have some data at home that I keep around from my Army career, and I looked at the time yesterday and it was—I left Westover Field, Massachusetts, at about 5.30 and arrived in New York about 9.30, and had to leave about 11.30, 12 o'clock from New York.

Q. That was 11.30 P. M. you mean? A. Yes, sir.

Q. As I understand it now you say that you have refreshed your recollection overnight from some memoranda that you have at home? A. Yes, sir. I had a schedule that I was supposed to keep that the Army gave me; that was a schedule that the Army gave me when I left Westover Field, Massachusetts, a transportation schedule.

Q. Have you got that card with you, Melvin? A. No, sir, I don't.

Q. You don't have it with you now? A. No, I don't.

Q. You say the Army gave you this schedule to keep. Was that something that you were required to turn over to
2585 some officer at Goldsboro, when you reported there? A. No, sir, not at all.

Q. Was it an official form of some kind? A. It was an official form, yes, mimeographed form, yes, sir.

Q. What was its purpose, if you know? A. It gave the time of the train's leaving and the time of the train's arrival and departure again.

Q. Am I mistaken? I thought you said that it was a form which the Army gave you to keep, a schedule which they gave you to keep. Am I wrong in assuming that that means that there were certain entries you had to make on it? A. No, sir, not at all.

Q. Well, just what was it? A. It started this way, sir: It was dated about the 24th, sir—I looked at it—dated the 24th of November, and it said, "To depart"—and I remem-
2586 ber the name of the town also, Springfield, Massachusetts, sir——

Q. A little more slowly and loudly so that we can all hear. A. It says, to depart from Springfield, Massachusetts, at approximately 5.30 and arrive at New York at 9.30 and depart from New York at 11.30 or 12.

Q. On what date now? A. I think it was the 24th it was dated, that was November 24th, and arrive on the 25th at Goldsboro, North Carolina, at approximately 3.30 in the afternoon, 3.30 P. M.

Q. And you followed out those instructions? A. Yes, sir.

Q. And Martin Bayer was with you all the time? A. That is right.

Q. So that you just had a few hours with your family and your wife in New York before you went down? A. That is right.

Q. At the time you were going to Goldsboro, did you know you were going to an outfit that was ultimately and shortly going overseas? A. Well, the way that reached us, sir, I believe we were going overseas. And the way the orders read, "Project", I think for overseas, or something like that.

Q. When you met your family and your wife you told 2588
them, I assume, that you were being sent to an outfit that was going overseas, did you not? A. Well, I didn't want to tell them directly. My mother is very nervous and I didn't want to upset her. I didn't tell her exactly what was going on; no, sir.

Q. You did not tell her that you were going overseas? A. Well, she tried to get it out of me, but——

Q. Did you tell her? A. I don't believe I did, sir, at that time.

Q. Did she find out in some other way, if you know, at that time? A. I don't believe so, sir.

Q. I assume that all of you had dinner together and you were all sitting around and talking? A. Well, I spent a lot of time with my wife; I was engaged at that time to my 2589
wife now.

Q. At dinner I assume you were all sitting around talking? A. Yes, for about a half hour.

Q. Did you hear Martin Bayer say anything to his parents about where he was going? A. Well, I don't know if he told them.

Q. Did he tell his folks that he was going overseas? A. I don't believe he did, in my presence, sir. I don't know if he did or not.

Q. Did you ever meet a Major in the Army named Major Saffron? A. Never have, sir.

Q. Do you recall the time that you went to the Induction Center at Grand Central Station? A. Yes, sir.

Q. Did you meet him there that day? A. No, sir.

Q. Were you introduced to any officer that day by Mr. Samuel Bayer? A. Nobody at all, sir.

Q. But Mr. Bayer was with you that day when you went to the Grand Central Station with Martin? A. Yes, sir.

Q. Do you know any of the gentlemen named Busch who run the I. Buss Uniform Company? A. I believe it is my uncle's brother-in-law or something like that.

2591 Q. Philip Busch and Harold Busch and Joe Busch? A. Yes, sir.

Q. Were any of them with you that day at the Induction Center? A. I think one of them was with me. I don't recall, though, very clearly, but I think he was.

Q. But your best recollection is that one of those three Busch brothers was there? A. Yes, sir.

Q. After your enlistment into the Army, did you see Mr. Samuel Bayer from time to time during the spring and summer of 1943? A. When I had a pass I would most likely stop over and say hello.

Q. Did you see your uncle, Elias Bayer? A. Not too often because he lived in New York.

Q. Did you see him at some time during that period? A. Maybe once, or something like that; twice.

2592 Q. At any time that you were talking with Mr. Samuel Bayer did he ever tell you that he knew Lieutenant Roeser? A. No, sir, he never did.

Q. You knew Lieutenant Roeser, did you not? A. I worked for him, yes, sir.

Q. You worked under his immediate orders? A. Yes, sir. In his section.

Q. Did Mr. Bayer ever tell you that he knew Major Radovich? A. No, sir; not to me, not at all.

Q. There came a time when you came under Major Radovich's command, the First Fighter Command? A. At the same time as Lieutenant Roeser, yes, sir.

Q. At any time thereafter did Mr. Bayer tell you that he knew Captain Radovich? A. No, sir.

Q. Did he tell you he knew Colonel Vidal? A. No, sir.

Q. Did he tell you he knew Colonel Jacobson? A. He did not, sir.

Q. Did he tell you he knew another officer on the field named Captain Kogan? A. No, sir, he did not.

Q. Did you ever meet Captain Kogan? A. I don't believe so; on the field, sir, you see so many officers and I don't recall all the names. 2594

Q. In any conversations that you had with Martin Bayer did the name of Captain Kogan ever come up? A. No, sir.

Q. Or Colonel Jacobson? A. No, sir.

Q. Or Colonel Vidal? A. No, sir.

Q. Captain Radovich? A. No, sir.

Q. Captain Engelhardt? A. No, sir.

Q. Did you know Colonel Vidal? A. I believe he was in the First Fighter Command, sir. I don't know what he did there. I just heard the name around there.

Q. Did you ever see him? A. I don't think I ever did, sir.

Q. Did you ever see Colonel Jacobson? A. I think I might have seen Colonel Jacobson because he had something to do with our department, I believe.

Q. Did Samuel Bayer or Elias Bayer ever tell you at any time during the year 1943 that they had entertained Colonel Jacobson? A. No, sir. 2595

Q. Or that they had entertained Colonel Vidal? A. No, sir, they did not.

Q. Or that they had entertained Captain Radovich? A. They never told me, sir, anything like that.

Q. Or Lieutenant Roeser? A. No, sir.

Q. Did they ever tell you at any time during 1943 that they had paid for uniforms for any of those officers? A. No.

Q. You never heard anything at all about that? A. No, sir; not until I read about it in the papers.

Q. Did you ever hear from anybody that these officers, Colonel Vidal and Lieutenant Colonel Jacobson and Captain Radovich and Lieutenant Roeser, had received or had gotten uniforms from the I. Buss Uniform Company? A. You say at any time?

Q. At any time in 1943? A. No, sir, I never did.

Q. While you were at Mitchel Field? A. No, sir.

Q. You never heard it? A. I never heard it.

Q. Did you ever hear that your uncle, Samuel Bayer, had paid for uniforms for any of these officers? A. No, sir;
2597 not at that time.

Q. During that time? A. No, sir; not at that time.

Q. Directing your attention to your transfer from the First Fighter Command to this medical detachment at the Base at Mitchel Field— A. Yes, sir.

Q. You requested a transfer at that time, did you not, Melvin? A. No, sir; it was pretty odd the way it happened, sir.

Q. Well, will you first answer my question as to whether or not you made a written request for transfer? A. I did not make—I did not write a request, sir.

Q. Well, did you sign a request for a transfer? A. After I was asked to, yes, sir.

Q. Do you know whether or not Martin Bayer made a request for a transfer? A. He was along with me all that
2598 time the same incident happened.

Q. And you both signed requests for transfers? A. After we were asked to sign the requests.

Q. By whom were you asked? A. By a Lieutenant in the Medical Corps in the First Fighter Command.

Q. By a Lieutenant in the Medical Corps in the First Fighter Command? A. Yes, sir.

Q. Did you refuse to sign it at first? A. No, sir. I did not.

Q. Did you refuse at any time to sign it? A. No, sir, because for the simple reason that the work was getting scarce there and we knew that there were ratings open in the medical detachment, and we liked to get something to do and we were pretty upset about not doing much work at the First Fighter Command.

Q. You were upset about not doing work at the First Fighter Command? A. After those two people came in to work.

Mr. Keenan: I do not hear the witness.

The Witness: After the two people came in with Lieutenant Roeser to work with him. 2600

Q. Sometime during the spring of 1943, members of the Women's Army Corps came into Mitchel Field, did they not? A. I believe a few of them; not many.

Q. What kind of work did they do, do you know? A. They were schooling them; the ones I knew, they were schooling them in weather, in the Weather Department.

Mr. Keenan: I do not hear that. I wish the witness would be cautioned to speak up.

The Court: Speak up.

The Witness: At that time they were instructing them on data about weather, to work with the Weather Department at Mitchel Field.

2601

Q. Were any of them doing clerical work? A. They might have been; I don't know, sir.

Q. Before you left the Base to come to the First Fighter Command, didn't some members of the Women's Army Corps come in there to do clerical work? A. There might have been a few, I think so.

Q. And then subsequently didn't they come over to do clerical work in the First Fighter Command? A. Not while I was there, I don't recall, sir.

Q. Well, in any event, you signed this request for a transfer to the medical detachment, and Martin also signed one? A. He signed it, yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Who is the first officer to whom that request would go in ordinary procedure? A. I don't understand that question, sir.

Q. Well, when you make out a request for a transfer to whom do you address it? A. To the Commanding Officer.

Q. And you have been in the Army now since 1942? Do you know where such a request goes first, to what officer does it go? A. I'm not sure, but I believe it goes to the
2603 Commanding Officer.

Q. Your immediate commanding officer? A. I imagine it gets to him eventually. I don't know which one gets it first.

Q. Melvin, you have done clerical work in the Army for quite a while, have you not? A. Yes, sir.

Q. And you have seen quite a lot of Army correspondence, have you not? A. Yes, sir.

Q. You know, do you not, that when a letter is written in the Army, it is handled thereafter by endorsements? A. Yes, sir.

Q. In the normal course a request for a transfer would go to what officer? I will withdraw that question and put it to you directly. Doesn't your request for a transfer go in the first instance to your immediate commanding officer? A. Are you referring to Lieutenant Roeser?

2604 Q. No, I am referring to your commanding officer? A. I believe it would, sir.

Q. And your commanding officer at that time was Captain Radovich, was he not? A. That's right, sir.

Q. Don't you know that in order to have that request proceed to a higher authority it would first have to be approved by your immediate commanding officer? A. I believe that's right.

Q. And you know, do you not, that Captain Radovich as a matter of fact did approve your request for transfer? A. I didn't know at that time, sir.

Q. You know that ultimately you were transferred, don't you, Melvin? A. That's right, sir.

Q. Well, now, didn't that mean to you that Captain Radovich had approved this transfer?

Mr. Keenan: I think he answered the question, if the Court please.

The Court: I will allow him to answer.

Q. May I have the answer? A. You want to know—will you repeat the question? 2606

Q. (Question read.) A. I believe so; it would mean that.

Q. Do you recall how long it was from the time that you and Martin first made your requests to be transferred until you finally were transferred from the First Fighter Command to the medical detachment? A. After we signed it must have taken about two weeks, sir.

Q. Could it have been a month? A. At that time—I believe it was two weeks; I don't know, sir, for sure.

Q. After you made out the request for the transfer at the request, as I understand your testimony, of the officer in the medical detachment——

Mr. Keenan: Just a minute. I object to that question. 2607

The Court: I think he said he signed it.

Mr. Keenan: That is right.

Mr. McGohey: I will withdraw it.

Q. After you signed this request for transfer, which as I understand you signed at the request of an officer in the medical detachment at Mitchel Field, is that correct? A. Yes, sir.

Q. You did that? A. Yes, sir.

Q. After that, between the time you signed it and the time you were ultimately transferred, did you have any conversations with this officer in the medical detachment about the transfer? A. No, sir.

Q. By the way, who was he, do you know? A. I don't recall his name, sir. I know there were two officers, I believe, in the First Fighter Command medical detachment. There was a Captain and a Lieutenant.

Q. A little louder and not quite so fast. A. I believe there were two officers in the medical detachment in the First Fighter Command. One was a Lieutenant and one
2609 was a Captain at that time.

Q. And you do not recall which of those two officers asked you to sign this request? A. Yes, sir; I remember it was the Lieutenant.

Q. It was the Lieutenant? A. Yes, sir.

Q. And not the Captain? A. No, sir.

Q. By the way, was that request for transfer which you signed, written in duplicate or triplicate, do you know? A. I don't think I signed—I don't know if it was, sir. I only signed one copy, I believe.

Q. Was it typewritten? A. Yes, sir.

Q. And did Martin sign his at the same time? A. Yes, sir.

Q. And was his typewritten? A. Yes, sir.

Q. And where were you when you signed it? A. In this Lieutenant's office.

2610 Q. In the office of the Lieutenant who asked you to do it? A. Yes, sir; he called us in.

Q. Please keep your voice up. A. He called us in.

Q. Even though I step up there, Melvin, everybody back here has to hear you. A. I am sorry.

Q. As far as you recall, were there any carbon copies attached to the request which you signed? A. I don't remember, sir. I don't believe there were, but there might have been.

Q. Now, Melvin, again I call to your attention the fact that you have been handling a lot of paper work in the Army, and correspondence of various kinds? A. Yes, sir.

Mr. Keenan: Your Honor, I object to that. I think that has been answered and I think the witness is trying to answer these questions. He said that he did not remember. He said that he thought that possibly there were but he did not remember.

The Court: I overrule the objection.

Mr. Keenan: Exception.

The Court: Go ahead.

2612

Q. Don't you know as a fact, Melvin, that all papers of this kind, all requests and all letters in the Army, are made out with several carbon copies? A. That's right.

Q. As a rule? A. As a rule.

Q. And you have seen other requests for transfer from other boys come over the desks and go into the files, have you not? A. I believe I have seen a couple of them.

Q. And in those cases there were usually extra carbon copies attached? A. No, sir.

Q. You never saw carbon copies attached? A. Not in the files, no, sir; just one copy of everything.

Q. Don't you know that a request for a transfer would have to be filed in various places? A. I don't believe so, sir. I believe—it might be, I don't know, sir, but all we received was one copy at the 201 file section.

2613

Q. I think I have asked you this question: between the time that you signed the request for transfer at the request of the Lieutenant and the time you were ultimately transferred to the medical detachment, did you have any conversation with that Lieutenant about the transfer? A. I didn't have any conversation at all with him, sir.

Q. Well, did you have any conversation with anybody about that? A. No, sir, I never did.

Q. Did you discuss it at any time with Mr. Samuel Bayer? A. No, sir, I did not.

Q. Do you know whether or not that request was disapproved at any time by any officer at Mitchel Field? A. I was not told about it.

Q. I asked you, do you know whether it was or not? A. No, I do not. I didn't know about it, no, sir.

Q. Melvin, don't you, as a matter of fact, know that that transfer was turned down by the Commanding Officer on the grounds that there was a shortage of clerical help at the First Fighter Command? A. I would have to laugh at that, sir.

2615 Q. Sir? A. I would have to laugh at that.

Q. Well, you can laugh, but I am asking you, didn't you know that? A. I didn't know that.

Q. Do you know that somebody stated that to be the reason why it was turned down? A. I did not know that.

Q. Do you know whether or not at the time that the transfer ultimately went through, that another soldier was transferred from the medical detachment to the First Fighter Command in your place? A. I did not know that.

Q. And that another soldier was transferred from the medical detachment to the Fighter Command in place of Martin Bayer? A. I didn't know it.

Q. You never knew it? A. I never knew it. This is the first I have heard of it.

Q. Do you know whether there was at Mitchel Field in
2616 August of 1943 a Major General by the name of Royce? A. He was Commanding Officer of the First Air Force.

Mr. Keenan: May I ask whether the question was, if this witness knew the General, or knew of him?

Mr. McGohey: I asked him whether he knew at that time. I asked him if there was a Major General named Royce at the field in August of 1943.

Mr. Keenan: Will you read that question that was asked before, Mr. Stenographer, please.

(Question read.)

Mr. Keenan: I wanted to be sure I had it.

Q. Don't you know as a fact that he disapproved the transfer? A. No, I knew nothing about it, sir.

Q. Did you in the summer of 1943 know a soldier at the medical detachment at Mitchel Field named Jerome L. Epstein? A. No, sir, I never knew him.

Q. You never met anybody by that name? A. No, sir, I never did.

Q. Don't you know as a matter of fact, Melvin, that he is the man that replaced Martin Bayer? A. No, sir, I never met him and I never knew of him. 2618

Q. You never heard of him? A. I never heard of him. This is the first I heard of him.

Q. Did you say to your commanding officer of the First Fighter Command that you desired a mutual transfer to be arranged between the First Fighter Command and the Medical Detachment? A. No, I didn't, sir.

Q. Do you know whether Martin Bayer did or not? A. I don't believe he did, sir.

Q. I ask you to look at that file, Melvin.

Mr. Keenan: May we have it identified, what he is looking at?

Mr. McGohey: I don't know that that is necessary, your Honor. 2619

Mr. Keenan: I don't see how we can follow this case from this record without it being identified.

The Court: He is being shown a document.

A. Yes, sir.

Q. Does that refresh your recollection, Melvin? A. No, sir. I am pretty sure he never did make anything like that.

Q. In any event, this does not refresh your recollection? A. No, it does not.

Mr. Keenan: I now ask that that instrument be identified, because I don't know how I am going—I think it should be marked in the record.

The Court: I will ask counsel to show it to you. He doesn't have to introduce it.

Mr. McGohey: Mr. Keenan, I just got that back from you this morning.

Mr. Keenan: I just got it from you after the Colonel said it wasn't there, and the Judge ordered——

2621 The Court: I don't like these——

Mr. Keenan: He started it, your Honor.

Mr. McGohey: No, I didn't start it.

The Court: I am not going to pass on who started it, but I am stopping it. I don't like these altercations between counsel.

Mr. McGohey: I don't like them either.

The Court: All right. Now the document has been shown to counsel. You may proceed. Have you further questions?

Mr. McGohey: Yes, your Honor. Pardon me for just a moment.

Q. Melvin, I understood you to say that when you signed this request for transfer Martin Bayer was present and
2622 signed a similar request? A. Yes, sir.

Q. Both of course at the request of this officer? A. That is right.

Q. Would you look at that top sheet there (handing)? A. That might be the same one.

Q. The same kind that you signed? A. Yes, sir.

Q. And the same kind of— A. It might be. I don't remember the exact wording of it.

Q. Well, take a good look at it, Melvin. A. I wouldn't remember it, sir, because it has been so long since I have seen it, and I didn't look at it very closely at that time.

Q. Is it substantially the same as the one you signed? A. I couldn't answer that, sir, because—it looks like the same one to me.

Q. Well, in the request that you signed did there appear this language, "Although I have no practical or specialized training in the medical department, it is my sincere belief that if said transfer is favorably considered my service to the Government would be of much greater value than at present"? A. I believe it ran like that, something like that.

Q. Prior to going into the Army, Melvin, how far had 2624
you gone in your education? A. I had high school and I had some trade school training, sir; I had a little college at night.

Q. Did you state those facts in this application for transfer? A. I believe so; I don't recall.

Q. Well, do you recall whether or not you related those facts to the officer who prepared the request for transfer? A. I didn't speak to him at all before he called me in, sir.

Q. Well, was the letter all prepared before you came in? A. Yes, sir.

Q. And this information about your education was in it? A. I didn't know if it was in it, that part I don't recall, I don't know if it was in it; it might have been in it, but I don't remember, it has been so long now.

Q. Well, could he have gotten that information any place 2625
else? A. My service record, very easily.

Q. Would your service record show all of your educational background? A. Yes, sir, everything.

Mr. McGohey: May I have this marked for identification, your Honor.

(Marked Government's Exhibit 26 for Identification.)

Mr. McGohey: I have no further questions of the witness, your Honor.

Mr. Robb: I have a few questions.

*Cross-examination by Mr. Robb.*

Q. Melvin, how many people does this application or request for transfer have to be approved by? A. I don't know, sir.

Q. Quite a few, didn't it? A. I imagine so, sir. Usually it does in the Army.

Q. Started out, though, down in your organization by Captain Radovich, is that right? A. I don't know. Started
2627 by me, as far as I know.

Q. Do you know whether or not it also had to be approved by Lieutenant Roeser? A. I imagine it would; the section, yes, sir.

Q. This medical officer that you mentioned, what organization was he attached to? A. He was with the Medical Detachment of the First Fighter Command, I believe.

Q. That was not the same organization you were in, was it? A. Yes, it was.

Q. I mean the same particular organization, the same general organization? A. It was part of it, that is right. It was in the same building.

Q. Yes. But you were working in what particular branch of the First Fighter Command? A. The radar section.

2628 Q. The radar section. Do you know whether or not your request for transfer was approved by Colonel Travis? A. I didn't know anything about it.

Q. Did you know him? A. No, I didn't.

Q. You were just a buck private, you didn't know the officers? A. That is right; I didn't know the big shots.

Q. Melvin, Mr. McGohey asked you some questions about what you knew about this transfer. Am I correct that you were given to understand that you were being transferred

to make way for Roeser's girl? A. Well, there wasn't much work for two of us when we first started to work there, and then when four of us were working there there was hardly anything at all.

Q. The four included Roeser's girl? A. Yes.

Q. By the way, Melvin, this Medical Detachment lieutenant, who was his superior officer? A. I imagine the same superior officer of everybody else.

Q. Who was that, the commanding general? A. The commanding general of the First Fighter Command, I believe.

Q. In other words, he wasn't under Captain Radovich? A. No, sir, he wasn't.

2630

Mr. Robb: Thank you.

The Court: Any redirect?

Mr. Keenan: Just a question or two, your Honor.

*Redirect examination by Mr. Keenan.*

Q. Melvin, to get this marriage business straightened out. You are pretty young not to remember your anniversary. When was it, in 1944? A. 1944. June 11, 1944. I am sorry, I am a little mixed up.

Q. All right. I might have an excuse— A. My wife is in the audience. It is pretty embarrassing.

Q. You told us that you only had one week's basic training while at Mitchel Field or any place else? A. That is right, sir.

2631

Q. But you did have that week's training? A. Yes, sir.

Q. How was it that you didn't complete the regular period of training? A. Well, I had a little trouble, I got a little sick and I was in the hospital for about a week, and then as I came out of the hospital I was told that it was discontinued, basic training was discontinued at that time.

Q. Discontinued for everybody there? A. For everybody, yes, sir.

Q. So that the reason that you didn't go on with the basic training was that there was no more given to anyone? A. That is right.

Q. Did that include Martin, too? A. Yes, sir, that included Martin, too.

Q. That is the reason why Martin got no more basic training than anybody else? A. That is right.

Q. The basic training would be to teach you how to use guns and how to fight? A. Yes, sir.

Q. And how to take care of yourself on the field of battle? A. That is right.

Q. And in travel? A. That is right.

2633 Q. And how to improve your muscles? A. Yes, sir.

Q. And your physique? A. Yes, sir.

Q. To meet the foe; is that right? A. Yes, sir.

Mr. McGohey: I object to Mr. Keenan testifying.

The Court: All right.

Mr. Keenan: I don't think there is very much novel about the——

Mr. McGohey: I object to all the comments.

The Court: Go ahead.

Q. By the way, were you asked any questions about this by any representative of the Federal Bureau of Investigation? A. I don't know who he was, sir, but when I was at Delaware somebody came in and questioned me, an officer.

2634 Q. Was he in uniform? A. Yes, sir.

Q. Then that wouldn't be the F. B. I., that would be the Army? A. Yes, sir.

Q. Someone in the Army asked you about this matter of transfers? A. At that time I didn't know what it was all about, but now I find it was about that.

Q. Did you make any statement, did you answer questions that were asked you? A. Yes, sir.

Q. How long did the interview take, about? A. About a half hour, I would say.

Q. Did he write down any answers to your questions? A. Yes, sir; there was a stenographer there.

Q. There was a stenographer there? A. Yes, sir.

Q. Was the transcript of what you said typewritten and presented to you to sign? A. I don't remember.

Q. Or do you remember? A. I don't remember if I signed it or not, but it was typewritten, because—for the simple reason it went through my office eventually. I didn't see it, but I was told it did.

Q. You were asked some questions by a military person? A. Yes, sir.

2636

Q. Was he an officer? A. Yes, sir, a major, sir.

Q. A major? A. Yes, sir.

Q. Do you remember whether his name was Hogan, Major Hogan? Would that help you? A. I don't think he introduced himself to me.

Q. He was just a major? A. Yes, sir.

Q. Now did anyone tell you when you got down to Goldsboro that you were joining an outfit that was purely a voluntary unit and that you didn't have to continue there unless you wanted to? A. No, sir, nobody said anything to me about that.

Mr. Keenan: I think that is all.

Mr. McGohey: No further questions.

The Court: All right, stand down. Call the next witness. 2637

(Witness excused.)

Mr. Keenan: Your Honor, I have a couple of short witnesses here that I would like to put on.

The Court: All right.

ROBERT J. ENGLAND, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Robert England? A. That is right.

Q. E-n-g-l-a-n-d? A. That is right.

Q. Where do you live, Mr. England? A. 81 High Street, Bloomfield, New Jersey.

Q. What is your business? A. I am credit manager for James Talcott, Inc., New York.

Q. How long have you had that position; how long have you been so engaged? A. Approximately 12 years.

2639 Q. Before that what did you do? A. I was credit manager; assistant credit manager, for the Chemical National Bank.

Q. Chemical National Bank, New York? A. That is right.

Q. Does your business carry you into metropolitan New York? A. It does.

Q. Generally? A. Generally.

Q. In what industry do you have your business acquaintances or contacts with credit? A. Frankly, they are quite diversified.

Q. Diversified. Do you know the defendant Samuel Bayer? A. I do.

Q. And do you know his brother, Elias Bayer? A. I do not.

2640 Q. You don't know him. How long have you known Samuel Bayer? A. Over a period of approximately six years.

Q. Do you have contact with the people with whom he does business? A. I do.

Q. And frequent contact? A. I have had, yes.

Q. Have you the means from your contact in metropolitan New York in your business of knowing what the reputation of Samuel Bayer is as to being a man of good character? A. I do.

Q. What is that reputation? A. Well, he has a reputation for character and honesty.

Q. By "character", I don't want to put words in your mouth, but what kind of character? A. His reputation as we would class it is good.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions, your Honor.

The Court: You may be excused. Call the next witness.

The Witness: Thank you.

Q. It was suggested that I should ask you something 2642
more about the James Talcott Company. Are they commercial bankers? A. Factors and commercial bankers.

Q. Are their transactions extensive here in the metropolitan district? Is it a large organization? A. Well, our volume runs approximately 150 million dollars.

Mr. Keenan: I think that is all.

Mr. McGohey: No questions.

The Court: Call the next witness.

(Witness excused.)

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MAX E. SANDERS, called as a witness on behalf of de- 2643
fendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Sanders? A. Max E. Sanders.

Q. What is the first name? A. Max.

Q. Max? A. That is right.

Q. What is your business or profession? A. I am an attorney.

2644 *Max E. Sanders—For Defts. Bayer—Direct.*
*Sol Fisher—For Defts. Bayer—Direct.*

Q. Where do you practice law? A. At 40 West 40th Street, in the Borough of Manhattan, City of New York.

Q. How long have you been a practitioner at the bar? A. 35 years.

Q. Do you know the defendants in this case, Samuel Bayer and Elias Bayer? A. I do.

Q. How long have you known them? A. Upwards of ten years.

Q. Have you had contact with them from time to time in their business and social acquaintances? A. Yes, sir.

Q. And have you the means of knowing what their reputation is in this community as to character and stability
2645 and citizenship? A. Their reputation is good.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions.

Q. That applies to Elias as well as Samuel? A. That is correct; both of them.

Mr. Keenan: Thank you.

(Witness excused.)

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Sol Fisher, called as a witness on behalf of defendants
2646 Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is what? A. Sol Fisher.

Q. Fisher. Where do you live, Mr. Fisher? A. 40 West 77th Street, New York.

Q. Speak a little louder, please. A. 40 West 77th Street, New York.

Q. How old are you, Mr. Fisher? A. Sixty-one.

Q. And what is your business? A. Manufacturer of men's shirts and pajamas.

Q. Do you have factories? A. Yes, sir.

Q. Where are they located? A. One is in Uniontown, Pennsylvania, and one is in Maryland, Frostburg, Maryland.

Q. You have offices here in New York? A. Yes, sir.

Q. What is your position with that company? A. I am the president of the company.

Q. And have you done business—do you know the defendant Samuel Bayer? A. I do.

Q. And his brother, Elias Bayer? A. Yes.

Q. How long have you known Samuel Bayer? A. About 2648
thirty-two years.

Q. And have you known him well during that period? A. I have known him well.

Q. Pardon me. Was the answer yes or no? A. Yes, sir.

Q. You have frequent contacts with him? A. Yes, sir.

Q. And with Elias Bayer, you have seen him? A. Not as much as with Samuel.

Q. Not as much as with Samuel, but do you know Elias? A. I know Elias, yes.

Q. In the transaction, in business affairs that you have in New York City, do you come in contact with others who know Mr. Samuel Bayer and have known him for some period of time? A. I do.

Q. And those who have had business relations with him? 2649
A. Yes.

Q. And social relations with him? A. Quite a few.

Q. A few? A. Yes, sir.

Q. And have you the means of knowing his reputation in the community or metropolitan New York as to his character and stability and citizenship and the like? A. Yes, sir.

Q. What is that reputation that he bears? A. Very good.

Q. And do you subscribe to that, that that is the same as you found his reputation to be from your contact? A. Yes, sir.

Q. How about Elias Bayer? A. Well, I don't know him as well as Samuel Bayer. I have met him occasionally, charitable institutions, and I used to meet him once in a while, but not in business direct.

Q. Charitable institutions? A. Yes.

Q. And not any business contact? A. Not any business contact.

Q. Would you feel therefore that you could not pass
2651 upon the reputation of Mr. Elias Bayer? A. I would.

Q. You could or couldn't? A. Yes, sir, I could.

Q. What is that? A. Good.

Mr. Keenan: You may have the witness.

Mr. McGohey: I have no questions, your Honor.

The Court: That is all. Call the next witness.

(Witness excused.)

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HOWARD MARKEL, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

2652

Q. Your name is Howard Markel? A. That is right.

Q. Where do you live, Mr. Markel? A. Reading, Connecticut.

Q. What is your business? A. I am connected with the Merchants Bank of New York.

Q. Merchants Bank of New York? A. That is right.

Q. What is your connection with that bank? A. I am the president.

Q. You are president of it? A. That is right.

Q. Do you know the defendant Samuel Bayer? A. Yes, I know Mr. Bayer for a long time.

Q. Would you give us some approximate idea of the years? A. About fifteen years.

Q. During that time have you had business dealings with him? A. Yes, very extensive.

Q. And as a banker I suppose you would see him very often in reference to these business affairs? A. That is right.

Q. And do you know others with whom he does business, too? A. Yes, quite a few of them.

Q. Do you know Elias Bayer, his brother? A. I don't know him as well, but I have seen him during that period also frequently. 2654

Q. Do you have sufficient, or have you had sufficient relationships with those who know Samuel Bayer in his community—withdraw that.

Q. Where is your bank located in New York? A. 434 Broadway.

Q. Where is that with reference to the streets? A. Near Canal Street.

Q. Do you have the means of knowing the reputation of Mr. Samuel Bayer as to his character, his probity, the reputation he bears as a good citizen or otherwise? A. I think so.

Q. What do you say his reputation is? A. Well, in our dealings with Mr. Bayer over those fifteen years we have found him to be of excellent character and we have heard no criticism from any outside people that we know who are acquainted with him. 2655

Q. What about Elias Bayer, what contact have you had with him? A. I think we can say the same for him.

Mr. Keenan: You may have the witness.

Mr. McGohey: No cross-examination.

The Court: Call your next witness.

(Witness excused.)

Mr. Keenan: I would like to have this Colonel Travis who was a Government witness who was excused.

Could I have that last Government exhibit?

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ROBERT B. TRAVIS, called as a witness on behalf of defendants Bayer, being previously duly sworn, further testified as follows:

2657 *Direct examination by Mr. Keenan.*

Q. Colonel Travis, when you were here the last time testifying as a witness for the Government, I think I asked you a question if you knew about the part of the Government's file, or if you had any of the records that would show the endorsements of the transfers of these two boys, Melvin Usdan and Martin Bayer. Do you remember that? A. Yes, sir.

Q. And you told me, I believe, that you didn't have such records? A. That is correct, sir.

Q. Now you were mistaken about that, weren't you? A. No, sir.

Q. Did you have such records? A. No, sir. The only
2658 thing that I had was the orders that were offered in evidence, no correspondence at all.

Q. Well, I will show you Government's Exhibit 26 and ask you if you have ever seen this before? A. Yes, I have seen this before, but it is not a part of my files.

Q. Where did you see it? A. In the District Attorney's office.

Q. It was not a part of your file? A. No, sir.

Q. Did you bring a file to the United States Attorney? A. I brought this particular file into the United States Attorney.

Q. I don't think I understand you very well. Will you relate the— A. Yes, sir. Those are from the headquarters of the First Air Force and I was simply a messenger that delivered them here. They are not from the files of my headquarters at all.

Q. What files were you supposed to have at your headquarters? A. The orders that I brought in at the same time and I believe that have been offered in evidence, the order directing the transfer of the soldiers from the First Fighter Command to the Medical Detachment at Mitchel 2660
Field.

Q. And the order referred to and you also gave us some information and related the fact that there were twelve endorsements? A. That is right. That is indicated in the order.

Q. In the order? A. Yes.

Q. And I asked you—you brought in special order 231? A. I believe that is the number of it, sir; I am not sure of the number.

Q. I am reading from the transcript.

The Court: All right.

Q. When you were here the first day of this trial as a Government witness you were asked these questions and 2661
gave these answers, I believe.

"Q. Those were all the regular records of the United States Army?" And you answered, "Yes, sir."

"Q. And in proper form? A. Yes, sir.

"Q. I noticed that in one, I think it was Government's Exhibit 2, the transfer of Melvin Usdan, there was some statement of twelve endorsements. You remember that? A. Yes, sir.

"Q. What would that mean, Colonel? A. To make it clear, I had better explain how that is handled, sir.

"Q. I wish you would. A. The letter originates with an individual with the headquarters or from any source that would put it into the military administrative channels. Instead of a reply to that or any action being taken on that, it being handled in a new letter, each office through which it passes puts an endorsement on it, that is, they write a letter, a specific form used by the Army, and they call that endorsement. Since the letter had twelve endorsements on there, it indicates it was originated with the individual and passed through twelve offices in which it went to the First
2663 Fighter Command with a direction that transfer be effected, and each of those endorsements is tantamount to a new letter. That is a form of correspondence that the Army uses entirely."

Do you recall that? A. Yes, sir.

Q. "Q. In other words, in simple language, that had to pass through twelve different types of authority before it became valid? A. Yes, sir.

"Q. And all of those things were recorded and are recorded some place in the Army records, all those endorsements"?

I asked you that question and you gave this answer: "They were requested, but it is not required. Correspondence of that sort are not maintained in permanent records of any organization."

2664 Did you give that answer? A. Yes, sir.

Q. Then the next question was asked of you:

"Q. Are those records available?" and you answered: "I don't know, sir."

Is that true? A. Yes, sir.

Q. "Q. Are the original records of whoever made that application available any place?" and did you answer, "No, sir, they are not"? A. That is correct, sir, and the original records are still not available, sir.

Q. "How soon are they destroyed after they are made? A. They may be destroyed any time after six months."

Now as a matter of fact you had, yourself, brought to the United States Attorney's office records, official Army records, showing the twelve endorsements, did you not? A. That is right, yes, sir.

Q. And I am now presenting to you a paper marked for identification Exhibit 26 and ask you if that is not, that information and data, from the official records of the Army? A. I believe it is the same, sir.

Q. And that record does show each and—is supposed to show each and every endorsement, is it not? A. That is right.

Q. And you brought that to the United States Attorney? A. Yes, sir.

Q. And handed the records to him? A. That is right.

Q. That is all you know about it? A. That is right.

Q. You don't know how it happens that they were not presented or no questions were asked you about it? A. That is the reason——

Mr. McGohey: I object to that.

Q. I am saying, you don't know? A. No, sir.

Q. When an objection is made, wait until it is ruled upon.

The Court: I will overrule it. Go ahead. 2667

Mr. Keenan: Now, your Honor, we offer this in evidence.

The Court: Is there objection?

Mr. McGohey: No, your Honor.

The Court: All right, sir, let it be admitted.

(Marked Defendants Bayer's Exhibit D.)

The Court: Have you further questions?

Mr. Keenan: None of this witness.

The Court: Have you further questions?
Mr. McGohey: No, I have no questions, your Honor.
The Court: Mr. Robb?
Mr. Robb: No, sir.
The Court: All right, you may be excused.
(Witness excused.)
The Court: We will take a ten-minute recess.
(Short recess.)
The Court: Are you ready to call another witness?
Mr. Keenan: Yes, sir.
The Court: Call him.

2669

JOSEPH SULLIVAN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Mr. Sullivan, where do you live? A. In Washington, D. C.

Q. What is your occupation? A. I am a Federal employee in the Adjutant General's office of the War Department.

Q. Federal employee? A. Yes, sir.

Q. Adjutant General's office at Washington? A. That
2670 is right.

Q. Did you come here in response to a subpoena to bring some records? A. Yes, sir.

Q. And the records you brought were official records from the files of the War Department? A. Yes, sir.

Q. And you were subpoenaed and asked to bring with you the 201 files of Martin Bayer and Melvin Usdan is that correct? A. Yes, sir.

Mr. Keenan: May we have this marked as Defendants' Bayer Exhibit E?

(Marked Defendants' Exhibit E for Identification.)

Q. I will ask you if this Defendants' Exhibit E came from the file 201 of Martin Bayer? A. It did, sir.

(Mr. Keenan hands paper to Mr. McGohey.)

Mr. McGohey: No objection.

Mr. Keenan: We offer this in evidence. Do you want to see this, your Honor?

The Court: No. Mark it.

(Defendants' Exhibit E for Identification received in evidence.) 2672

Mr. Keenan: May I read this to the jury?

Mr. Robb: May I see it, Mr. Keenan?

Mr. Keenan: Yes. I am sorry.

Mr. Robb: No objection.

(Defendants' Exhibit E read to the jury.)

Mr. Keenan: There is stricken out in this statement three words, "for overseas service." There is stricken out on the side, "Authentication, seal of notary public, signature and title of witness, address of witness." There is stated at the bottom, "Strike out words that do not apply." There is also stated, "This certificate should be witnessed by a notary public or other official having authority to administer oaths, or by an officer of the Regular Army." 2673

The exhibit is in the form of an ordinary document and bears some other writing that are unsigned, and I shall therefore not read them.

The Court: All right.

Q. Do you have in your hand a document that was taken from the file of Melvin Usdan? A. Yes, sir.

2674 *Joseph Sullivan—For Defts. Bayer—Direct.*

Mr. Keenan: I ask that this be marked as an exhibit (hands paper to Mr. McGohey).

Mr. McGohey: Are you offering only this one letter at this time?

Mr. Keenan: Yes.

Mr. McGohey: I have no objection.

Mr. Robb: No objection.

(Marked Defendants' Exhibit F.)

Q. I will show you this Defendants' Exhibit F and ask you if that is part of the regular 201 file of Melvin Usdan? A. Yes, sir, it is.

2675

Mr. Keenan: I would like to read this to the jury at this time (reads Defendants' Exhibit F).

Will you mark this as an exhibit?

(Marked Defendants' Exhibit G for Identification.)

(Paper handed to Mr. McGohey.)

Mr. McGohey: I have no objection to that.

Mr. Robb: We have no objection, if your Honor please.

Q. I show you this Defendants' Exhibit G and ask you if this came from the 201 file of Martin Bayer? A. Yes, sir, it did.

2676

Mr. Keenan: We offer it in evidence.

The Court: All right.

(Defendants' Exhibit G for Identification received in evidence.)

(Read to the jury.)

Mr. Keenan: I would like to have the jury inspect this, if I may, your Honor.

The Court: All right.

(Defendants' Exhibit G handed to the jury.)

Mr. Keenan: I wonder, in order to save time, whether I might ask a question of this witness while the jury is inspecting the exhibit?

The Court: Yes.

Q. You are familiar with the contents of these files? A. Yes, sir.

Q. And these records that I have just read are all the data that are contained in the 201 files about the transfer of either one of these two boys? A. They are, in the open files.

Q. I have subpoenaed the 201 files from Washington. 2678
Are there any other files that you would know about? A. There may be what we term down there as the confidential files, which I wouldn't be allowed to bring up.

Mr. Keenan: That is all.

The Court: Any questions?

Mr. McGohey: May we look at whatever he brought up with him?

Mr. Keenan: Yes.

The Court: Are there any questions, Mr. Robb?

Mr. Robb: No, sir.

The Court: Have you any, Mr. McGohey?

Mr. McGohey: May we just leave the witness there and we will look at these papers, your Honor?

The Court: All right. Are you ready to proceed, 2679
Mr. McGohey?

Mr. McGohey: I was going to suggest, your Honor, that I find a number of cards and some papers here that this witness has produced. I should like to have a chance to look at them, but I am afraid that if I do it now it will take too much time. Might we do this: let the witness be excused now and let me and my associates look this over during the lunch hour, and

then if we want to take it up again with him, we can do it at that time.

Mr. Keenan: Well, I have a question or two to ask him first.

The Court: All right.

Mr. Keenan: It will not be on this, Mr. McGohey.

Mr. McGohey: I will either do it now, your Honor, or I think we might save time if I do it during the lunch hour.

Mr. Keenan: I have just a question or two.

The Court: All right.

2681 *By Mr. Keenan.*

Q. You came here in response to a subpoena? A. Yes, sir.

Q. Did you ever see the subpoena? A. Yes, sir; I have a copy of it.

Q. It starts off: "The President of the United States of America, to the Adjutant General, War Department, Munitions Building, Washington, D. C.

"We command you, that all business and excuses being laid aside, you appear and attend before Honorable Alfred D. Barksdale, District Judge, United States District Court, Southern District of New York, Room 1106, United States Courthouse, Foley Square, New York 7, New York, on the 15th day of October, 1945, at 10.30 o'clock in the forenoon,

2682 to testify and give evidence in a certain action now pending undetermined in the District Court of the United States for the Southern District of New York, between United States of America and Samuel Bayer, Elias Bayer and Walter V. Radovich, defendants, on the part of the defendants Bayer, and that you bring with you and produce at the time and place aforesaid:

"201 file of Sergeant Martin Bayer, ASN 12219010.

"201 file of Private Melvin Usdan, ASN 12219208.

"And the records showing orders and endorsements thereon, including names of officers making such endorsements for all transfers of the above-named soldiers between date of enlistment and the present date of this trial, to wit: October 2, 1945, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for failure to attend, you will be deemed guilty of a contempt of court," etc.

Did you read that subpoena? A. Yes, sir.

Q. Did you accept this subpoena for the Adjutant General of the United States Army? A. Yes, sir. 2684

Q. And you understood that it called for all records showing the orders and endorsements thereon, including the names of officers making such endorsements for all transfers of the above-named soldiers between the date of their enlistment and the present date of this trial? Did you make an effort to obtain those at the War Department? A. Yes, sir; I brought all the records that are in the possession of the Adjutant General's office in the open file.

Q. This does not say anything about the open files or closed files, does it? A. No, sir, but there are records in the so-called confidential or secret files that I am not allowed to bring and divulge any information from those records.

Q. Who told you that? A. That is a practice in the War Department. It is the policy of the War Department. 2685

Q. Who told you it was the policy? A. The Major in the Judge Advocate General's Department.

Q. He gave you that instruction? A. Yes, sir.

Q. Did you talk over with him what you should bring down here? A. Yes, sir; and he told me that under Army regulations I could not bring the confidential file.

Q. And these are all the files that he gave you to bring down here with reference to the transfer? A. That is right. He did not give them to me but I secured them from the files.

Q. But the other files having to do with the transfers and the like that were of a confidential nature, you could not bring down because you did not have enough authority to do it yourself? A. That is right, sir.

Mr. Keenan: I think that is all of this witness at this time.

The Court: All right, you may be excused, but do not leave, be available.

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2687 Mr. Keenan: Now, I would like to read, your Honor—I understand the United States Attorney wants to examine some papers and then cross-examine this witness later on, is that correct?

Mr. McGohey: Perhaps.

The Court: Maybe.

Mr. McGohey: I say perhaps, your Honor.

Mr. Keenan: All right, I am very glad to go forward and read this, if I may be permitted to.

The Court: Yes, very well.

Mr. Cohen: Pardon me for batting for Mr. Keenan.

(Mr. Cohen reads Defendants' Exhibit G to the jury.)

The Court: Have you further testimony, Mr. Keenan?

Mr. Keenan: I call upon the United States Attorney to
2688 produce a statement made by Walter Radovich——

Mr. Robb: If the Court please, may we approach the bench for this?

The Court: All right, come up.

(The following took place at the bench:)

The Court: What have you to say about this document?

Mr. McGohey: Let me see what the first item is? I do not think they are entitled to that, your Honor. I have not offered that in evidence. I have offered a statement

of March. It has no relation at all with the statement of September. It has been referred to, it is true, but it has no relationship to it at all. I do not know of any ground that the defendants are entitled to this statement.

Mr. Keenan: How do I know that Major Radovich is not going to take the witness stand?

Mr. McGohey: There is not anything shown here that will indicate that the statement of September 6th is different or contradicts in any way the statement of March.

The Court: What is your position, Mr. Robb?

Mr. Robb: If the Court please, our position is that we cannot see how anything Major Radovich may or may not have told some third person has any bearing upon Mr. 2690
Keenan's clients' guilt or innocence?

Mr. McGohey: Your Honor, you have admitted the March statement——

The Court: Do you object?

Mr. Robb: Yes, sir.

Mr. McGohey: The March statement was admitted under a very careful instruction to the jury which your Honor said you would repeat in your charge, that it was to be considered only as against the defendant Radovich. There is no suggestion made here that there is any contradiction. As a matter of fact, insofar as there is any testimony of the question of the relationship of the September statement to the March statement, it is this: that they are identical.

The Court: The ruling of the Court is that the Court 2691
will not require the production of the paper.

Mr. Keenan: Will the record show an objection upon the part of the United States Attorney to produce them?

The Court: The objection on the part of the United States Attorney and an objection on the part of the defendant Radovich.

Mr. Keenan: We believe that we are entitled to produce in the defense of Samuel Bayer and Elias Bayer any rele-

vant testimony that in any manner within the principle of reasonable proximity is conducive to their innocence, and that we believe that the statements contained—that if we want to, we have the right to introduce them as made by Radowich, just as much as the Government has; that if it would in any manner show the innocence of the defendants that these statements against interests do not belong alone to the Government, it belongs to any party in the lawsuit.

We believe that we are being deprived of our right to produce before this Court and jury relative and pertinent testimony that might even be determinative of the entire issue in the prosecution, and that a failure to do so pre-
2693 vents us from in turn presenting other evidence upon which such information would be based.

Mr. McGohey: I have this to say: I will ask that your Honor take the September statement and read it. I think maybe your Honor has already read it.

The Court: I have, but I am not very familiar with it.

Mr. McGohey: I will submit the statement to the Court so that the Court may examine it to determine whether or not there is any contradiction between the statements, and if there be no contradiction, then to seal it as an exhibit in this trial so that it can be available for the appellate court on review if there be an appeal.

Mr. Robb: If the Court please, might I say here that we called upon Mr. McGohey at the time we were cross-examining the agent, Flynn, to produce the September
2694 statement, and Mr. McGohey refused to do it. I do not think this is a time to put this statement under seal and have it submitted to your Honor for some rather strange proceeding.

Mr. McGohey: It is not a strange proceeding.

Mr. Ansell: I furthermore think that it would lead, if I understand what is in the motion, to a trial of collateral matters, and prolong this trial and actually elucidate nothing.

2695

Mr. Robb: If the Court please, our position is simply that we called upon Mr. McGohey at the time we thought was the proper time to produce that statement, and you refused to do it. Now I do not think Mr. Keenan should be given that statement, perhaps to be used against our client. I do not know why he wants it. By the same token, I do not think it should be made available to your Honor under seal. We thought we were entitled to have it at the time we asked for it. Mr. McGohey did not give it to us. That was for a specific purpose.

Mr. McGohey: For what specific purpose?

Mr. Ansell: Even so, you are going to get into a long and almost interminable trial of collateral matters, and it will serve no useful purpose. 2696

Mr. McGohey: I do not think it will take your Honor too long to read that statement.

The Court: I am going to take this situation under advisement and let us go ahead with something else.

Mr. Keenan: I would want to have this decided before I decide what else I want to go ahead with.

The Court: What about these other statements?

Mr. McGohey: There is a statement there from some man named Smith, I believe. I never heard of that statement before and I never saw it, and I have no copy of it.

The Court: What about the other one?

Mr. McGohey: The other one I have, or I have what purports to be a copy of that. I never saw the original. I cannot for the life of me see what relevance that would have, 2697
your Honor, here. It is not mine. I have a carbon copy. I think we have a carbon copy of it, but the other one I never saw, the Smith statement.

Mr. Wallace, you never saw that either, did you?

Mr. Wallace: No.

The Court: You say you have a copy of this second statement?

Mr. McGohey: Yes, sir, I have. On the same theory, there is no objection to either one of these, except, your Honor, that I do not know the purpose of them. I cannot understand it. If it is claimed that they were going to contradict the statements that were put in, I am going to submit them to your Honor under the rule of the Krulewitch case and the Cohen case in this circuit.

The Court: I think I will let the jury go until two o'clock. The jury is excused until two o'clock.

(Jury retired from the courtroom.)

The Court: Let me have the statement referred to in paragraph 1, and anything you have pertaining to the statement referred to in Paragraph 2. I understood you to say
2699 you had a copy of that?

Mr. McGohey: Yes. May I get that, so that the record will show what I am giving to the Court?

The Court: Yes.

Mr. McGohey: I do not believe, your Honor, that there is any rule that anybody can just demand anything that they may think is in the possession of the Government unless there is some showing made or some reason——

The Court: They can demand all right.

Mr. McGohey: I mean, properly demand and get.

The Court: I did not say get. I say he can demand. This one is in evidence, is it not?

Mr. McGohey: This one is Exhibit 25.

The Court: Make yourselves at ease for a few moments.

2700 Mr. Keenan: May the record show that your Honor has been given the September statement, the March statement which is in evidence, and a typewritten paper which purports to be a statement of Major Radovich given to Colonel Snyder on the 14th of August 1944.

The Court: All right.

The Court: Gentlemen of counsel, I have not re-read the statement of March 15th which was introduced in evidence, because I had previously read it and heard it read in evidence and am familiar with its contents. I had already previously read the statement of September 6th and I have re-read that at this time, and I have read fully the carbon copy of the statement of the defendant Radovich to Colonel Snyder.

I am going to overrule the motion made of me that the United States Attorney be required to produce the documents which are not introduced, principally upon the basis of the fact that I have carefully examined them and I find no conflict in any matter of materiality in the two documents 2702
not admitted and the document which has been admitted, therefore I shall not require them to be produced.

I do think that the papers should be made a matter of record in the event that there should be a review of my decision.

Mr. McGohey: I suggest in that connection, your Honor, that you order them sealed and the sealed envelope marked as an exhibit. That practice has been followed in other cases in this Court.

The Court: All right, I will follow that suggestion and direct——

Mr. Ansell: That means they will not be spread upon the record?

Mr. McGohey: No. They will be sealed and marked "Court's Exhibits". 2703

The Court: They shall not go into the record in this case at all, but I do think it only fair that they be made available should anyone desire to review the ruling which has been made, which could not intelligently be made unless the papers were available.

Mr. McGohey: Do I understand your Honor to mean that they are to be made available to counsel for the defendants?

The Court: No, sir.

Mr. McGohey: Made available for the Court in the event of appeal?

The Court: Exactly.

Mr. McGohey: And may they be marked Court's Exhibits A, B and C?

The Court: They may be, but we haven't got a clerk here now to do it.

Mr. Ansell: Mark them exhibits in this case A, B and C.

Mr. McGohey: Mark them Court's Exhibits A, B and C and sealed.

2705 The Court: This (indicating) was in.

Mr. McGohey: I mean the two statements, A and B, Court's Exhibits A and B, and that they will then be sealed.

The Court: And available——

Mr. Keenan: The Court will grant us an exception to his Honor's ruling on that?

The Court: Yes, sir.

Mr. Wallace: Apparently the clerk has left, thinking the Court had recessed.

The Court: I will put them in my papers and have that done.

Mr. Keenan: Off the record, please.

(Discussion off the record.)

Mr. Keenan: Can we say this, that the defendants Bayer offer that part of HR 7528, passed by the United States
2706 Senate on October 24, 1942, by a vote of 58 to 5, which was as follows:

> "Section 7: No person under twenty years of age inducted under this Act shall be placed in actual combat duty beyond the territorial boundaries of the Continental United States until after he has had at least one year's military training following his induction."

From the Congressional Record of the 24th day of October, 1942, on page 8934.

This tender is not objected to by the United States Attorney because of the failure to present adequate formal proof, but is objected to on the ground of its claimed irrelevancy.

Mr. McGohey: The Government objects to it on the ground that it is irrelevant and immaterial.

The Court: Which objection the Court sustains.

Mr. Keenan: And an exception is noted.

Mr. McGohey: May the record also show, your Honor, that this resolution which was passed by the Senate never became law? 2708

Mr. Keenan: It is so conceded.

The Court: Very well.

(Recess to 2 o'clock p. m.)

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AFTERNOON SESSION.

Mr. McGohey: Your Honor, before we proceed, may those exhibits be marked now and sealed?

The Court: Yes, they will be marked as the Court's Exhibit A.

(Marked Court's Exhibit A.)

The Court: All right, gentlemen, are you ready to proceed? 2709

Mr. Keenan: Have you any further questions of the previous witness?

Mr. McGohey: Yes.

The Court: Come back, Mr. Sullivan.

JOSEPH SULLIVAN, resumed the stand.

*Cross-examination by Mr. McGohey.*

Q. Mr. Sullivan, this envelope contains the records which you brought up in answer to the subpoena, does it not? A. Yes, sir.

Mr. McGohey: Your Honor, may I have this series of cards marked for identification?

The Court: Yes.

(Marked Government's Exhibit 27 for Identification,
2711 eleven cards.)

Q. Mr. Sullivan, I show you these cards which are from these records that you brought up—they are now marked Government's Exhibit 27 for Identification—and ask you to tell us what those cards are and what their function is? A. Yes, sir. These cards are known——

Q. Mr. Sullivan, will you please keep your voice up loud enough so that the last juror and all counsel at this rear table can hear you? A. Yes, sir. These cards are known as the morning report locator card. The purpose of them is to record the assignment of the personnel concerned, as he is assigned to various stations so that we always know the location of the individual to whom those cards pertain.

2712 Q. And do those cards show the various t. .nsfers of the man to whom they refer? A. Yes, sir; that is the purpose of the card.

Q. Can you take the card of the earliest date in that exhibit? A. Yes, sir.

Q. By the way, for what soldier are those cards made out? A. These cards are made out for Martin Bayer.

Q. And can you tell from those cards when he first came into the Army? A. Well, when he first came into the

Army, that is evidenced by the enlistment record at the time he enlisted in the Army.

Q. Is there a card there indicating that? A. That is shown on the enlistment record.

Q. What does the card with the earliest date show? A. That card is dated the 22nd of December, 1942.

Q. What does it show? A. It shows that Martin Bayer was attached to Headquarters and Administration, and duty at First Base Headquarters, and Air Base Squadron at Mitchel Field, New York.

Q. What does the next one show? A. The next card, dated the 15th of April, 1942, shows Martin Bayer transferred from First Base Headquarters and Air Base 2714
Squadron at Mitchel Field, New York, to the First Fighter Command.

Q. What is the date of that? A. The date of that card is the 15th of April, 1943.

Q. Does that indicate that that was the date of his transfer? A. This indicates the date he was assigned to the First Fighter Command at Mitchel Field.

Q. What does the next card show? A. The next card, which is dated the 20th of August, 1943, shows him assigned and joined medical detachment, Aviation—I am not sure just what this other designation is—but it is Aviation, probably mechanics' force at New York.

Q. And what is the date of that? A. It is the 20th of August, 1943.

Q. May I see that a minute, please? A. Yes, sir (handing). 2715

Q. What does the next card show? A. The next card, dated the 23rd of August, 1943, shows him assigned to the medical detachment, 882nd—the designation here of the organization is perhaps a code term, but it was at Bradley Field, Connecticut.

Q. You are reading from here (indicating)? A. Yes, sir.

Q. Medical Detachment 882, and then the letters ABEN-GEN. Would that mean Airborne Engineers? A. It possibly does.

Q. At Bradley Field? A. It probably does.

Q. And the date of that is the 28th of August, 1943? A. Yes, sir.

Q. What does the next card show? A. The next card, dated the 25th of November, 1943, shows him assigned to the 715th Training Group.

Q. And what is the date of that? A. That is the 25th of November, 1943. This particular card does not show the station, however.

2717 Q. Very well. What does the next card show? A. The next card, dated the 7th of July, 1944, shows him assigned to the 1060th Army Air Force Base Unit at Greensboro, North Carolina.

Q. And the next card? A. The next card, dated the 21st of December, 1944, shows him a casual with this particular unit, with a shipment number—known as a shipment number in the War Department. It is AQ 448. And he was with the APO, 16795A, New York, which is also a temporary APO number.

Q. And APO stands for Army Post Office, does it not? A. Yes, sir.

Q. What does the next card show? A. The next card, dated the 23rd of January, 1945, shows him assigned to the port of debarkation at Army Post Office 881, New
2718 York.

Q. The next card? A. The card, dated the 1st of February, 1945, shows him with the 147th Replacement Company, Army Air Force, APO New York 494.

Q. And the next card? A. The next card, dated the 16th of February, 1945, shows him with the 412th Air Service Squadron, APO 690, New York.

Mr. Keenan: What is the date of that?

The Witness: The date of this card is the 16th of February, 1945.

Q. And have you another card for him? A. Yes, sir. The next card, dated the 20th of February, 1945, shows him with the 305th Air Service Group, APO 690, New York.

Q. Have you another card? A. No, sir.

Q. Now from those cards it is determinable at what various stations this man served, is it not? A. Yes, sir.

Q. And his various transfers? A. Yes, sir.

Mr. McGohey: I offer this in evidence. 2720

The Court: All right. Any objection?

Mr. Keenan: No objection.

Mr. Robb: No objection, your Honor.

(Government's Exhibit 27, consisting of eleven cards, received in evidence.)

Mr. McGohey: May I have that marked, please.

(Marked Government's Exhibit 28 for Identification.)

Q. I show you this paper marked Government's Exhibit 28 for Identification and ask you is that an official record from the office of the Adjutant General in the War Department at Washington? A. Yes, sir.

Q. And you have produced it here in obedience to the 2721 subpoena served on you? A. Yes, sir.

Q. Will you tell us what it is? A. Yes, sir. This is the enlistment record of the voluntary enlistment in the United States Army of Martin Bernard Bayer, 12219010.

Mr. McGohey: I offer it in evidence.

The Court: Any objection?

Mr. Robb: May I see it, please?

Mr. Keenan: No objection.

Mr. Robb: No objection.

(Government's Exhibit 28 for Identification received in evidence.)

Mr. McGohey: Your Honor, may I read a part of the exhibit to the jury?

It is stated this is the enlistment record of Martin Bayer's voluntary enlistment, and on the second sheet there appears what is called the physical examination with notes under that. Now, I am reading this last paragraph under the various notations that are made

2723 on the physical examination:

"I certify I have carefully examined the applicant and have correctly recorded the results of the examination and that to the best of my judgment and belief he is mentally and physically qualified for service in the Army of the United States."

And then there is stricken out some language which apparently would be used in case he was not qualified.

Mr. Keenan: I object to that. I think that is highly objectionable.

Mr. McGohey: I will withdraw it and point out to the jury that there are words stricken out. The exhibit speaks for itself.

The Court: Yes. Pass it around.

2724 Mr. Keenan: I ask the Court to instruct the jury to disregard those statements of Mr. McGohey.

The Court: I shall so direct. Let the document speak for itself.

Mr. McGohey: It is signed Louis Snyder, Captain, Medical Corps.

The Court: Any further questions?

Q. Do you have any papers similar to Government's Exhibit 28 for Melvin Usdan? A. I do.

Q. Do you have them with you? A. Yes, sir.
Q. May I see them, please? Are they over there?

(A folder was handed to the witness.)

Mr. McGohey: May I have this marked for identification?

(Marked Government's Exhibit 29 for Identification.)

Q. Is Government's Exhibit 29 a record from the office of the Adjutant General in the War Department in Washington? A. Yes, sir.
Q. And you have produced it here in accordance with 2726
the subpoena? A. Yes, sir.
Q. Will you tell us what it is? A. This is the enlistment record of the enlistment in the regular army of Melvin Usdan, 12219208.

Mr. McGohey: I offer it in evidence.
The Court: Any objection, gentlemen?
Mr. Keenan: No, sir.
Mr. Robb: No, sir.

(Government's Exhibit 29 for Identification received in evidence.)

Q. This sheet which was inside of that, is that a part of the enlistment record? A. Well, it is not a part of the 2727
record; it is a record attached to it which shows that the parent has no objection to the voluntary enlistment in the Army of this Melvin Usdan.

Mr. McGohey: I offer that also, your Honor.
Mr. Keenan: No objection.

(Marked Government's Exhibit 29-A.)

The Court: You may hand those to the jury.

Mr. McGohey: May I read partly from this Exhibit 29?

The Court: Yes.

(Mr. McGohey then read from Government's Exhibit 29.)

Mr. Keenan: I haven't any objection that going into evidence, but there is no issue raised about the physical condition of Melvin Usdan. I don't know what the purpose is.

Mr. McGohey: I object to the comment, your Honor.

The Court: All right. It doesn't matter. There is no objection to it. Have you further questions?

2729 Q. Do you have in your papers there a set of cards similar to those which you have just read and described with reference to Martin Bayer? A. Yes, sir.

Q. And those other cards that you have there now refer to Melvin Usdan, do they? A. These cards here refer to Melvin Usdan.

Q. They would show the same kind of things that the cards of Bayer show? A. Yes, sir.

Q. His various transfers? A. That is right.

Q. And the dates of them? A. Yes, sir.

Mr. McGohey: No further questions.

Mr. Keenan: I just have a question or two.

2730 *Redirect examination by Mr. Keenan.*

Q. If I understood you, Mr. Sullivan, those cards would tell where any soldier is when you look at it, would they? A. Yes, sir, that is the purpose of that card.

Q. Where is Melvin Usdan now? A. Melvin Usdan now, his latest report of change card hasn't come into the office.

Q. Where was he before? He is back in this country now, we all know that, he testified yesterday. But where did he come from, as far as your cards are concerned?

A. That would be shown by the latest card we have of record which is dated 10th of July, 1945. At that time he was with the Army Air Forces Base APO 679, New York.

Q. Does that mean he is in New York? A. No.

Q. Where? A. That meant that he was overseas.

Q. Where overseas? A. This doesn't show the geographical location.

Q. It doesn't show anything about it at all except New York, does it? A. It shows he is with the Army Air Forces Base, at the APO No. 679, New York, but those cards don't show the geographical location, but they are overseas. 2732

Q. It doesn't show anything more, your record, than this APO number New York, and that they are some place out of the United States? A. That is right.

Q. Have you got the last card on Martin Bayer? A. That is this other bunch of cards.

(Some cards were handed to the witness.)

Q. What is the date on that? How do you tell where the date is? A. This is the date up here (indicating). 20 February, 1945. At that time he was with the 305th Air Service Group, APO 690, New York.

Q. Does that mean he is in New York or does it mean he is in Burma, India? A. It meant he was overseas, perhaps in the European theatre of operation. 2733

Q. You wouldn't feel any too confident of that, would you, that he was over in the European theatre, from this card? A. Well, the APO number here would indicate that.

The Court: Any further questions?

Q. Do you know where this Exhibit E came from (handing to witness)? A. Yes. This came from the files in the Adjutant General's office in the War Department.

Q. You don't know when it came there? A. I do not. Presumably it came at the time the soldier enlisted in the Army.

Q. When a soldier enlists in the Army, does this waiver of his parents, in case he is a minor, always be sent on to Washington? A. Yes, sir. That indicates he is a minor and has had to get the consent of his parents or parent.

Q. Before he could be accepted into the Army? A. Yes, sir.

Q. Is that right? A. That is required by the recruiting officer.

Q. That is in accordance with the law? A. Yes, sir.

2735 Q. I notice the last statement, "I have no objection to his assignment or to his enlistment in the regular army upon his discharge from his enlistment in the regular army." Can you tell us if that is the regular form, if that is unusual, or if this is the regular form in these waivers of parents? A. That is regular. Apparently this soldier was in what is known as the regular army reserve. He had to be discharged from that component in order to enlist in the regular army, as distinguished from the regular army reserve.

Q. When do you mean? When was he in the regular army reserve?

Mr. McGohey: If he knows, your Honor.

2736 A. Only——

Mr. Keenan: If he doesn't, Mr. McGohey, he won't need anyone to tell him that he doesn't.

Mr. McGohey: I object to that, your Honor.

The Court: I object to these exchanges, gentlemen. Examine the witness.

Answer the question.

A. Presumably he was in the Army, Regular Army Reserve, immediately upon his enlistment in the Regular Army.

Q. Now you say he was in the Army Reserve immediately on his enlistment in the Regular Army. Is that your statement? A. That is my belief, as far as I can find out from these records.

Q. Are you meaning this by that, Mr. Sullivan, that the record shows that he first enlisted in the reserve and then later came into the Regular Army? A. That is what this record indicates.

Q. All right. When does it show that he enlisted in the reserve? A. I don't have those records here, sir. 2738

Q. When does it show that he was taken into the Regular Army from the reserve? A. The date shown on his enlistment paper.

Q. Wouldn't the 201 file have anything at all about any previous service of this soldier? A. It is possible it does not. Those records may be held, and often are, in the service command in which this soldier was living.

Q. Now I will read this to you again and see if you won't throw some additional light upon it. It is so much different from your previous statement.

"I have no objection to his assignment or to his enlistment in the regular army reserve upon his discharge from his enlistment in the regular army."

Isn't that just the other way about, that upon his discharge from his enlistment in the regular army the parent 2739
waives any objection to his assignment or his enlistment in the regular army reserve? Read it and see if that is not so. A. That is what this document states.

Q. As I stated it? A. Yes.

Q. All right. Now, in other words, to clearly understand this document, the parents stated that they had no objection to his assignment but it scratched out "for overseas service or to his enlistment in the regular army re-

serve army upon his discharge from his enlistment in the regular army." That is, there is no objection——

Mr. McGohey: I object to this, your Honor. The exhibit speaks for itself.

The Court: The objection is sustained.

Mr. Keenan: I think this witness has been asked many times to interpret these documents and their meaning by the United States Attorney.

The Court: I sustained the objection.

Mr. Keenan: Note my exception.

The Court: Yes. Go ahead.

2741 Mr. Keenan: I have no further questions to ask this witness.

The Court: Does anyone want to ask any further questions of this witness?

Mr. McGohey: No, sir.

The Court: All right, stand aside. Have you any further testimony, Mr. Keenan?

Mr. Keenan: I call Miss Anne Solomon to the witness stand.

The Court: All right.

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2742 Anne Solomon, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. What is your name? A. Anne Solomon.

Q. How old are you? A. Thirty-one.

Q. Where do you live? A. In Brooklyn, 659 Ocean Avenue.

Q. How long have you lived in Brooklyn? A. About twenty years.

Q. Are you married? A. No, sir.

Q. Do you have any family, any brothers or sisters? A. Yes, sir, I have two sisters, one brother, a mother and a father.

Q. Would you hold up your voice a little, Miss Solomon? A. Yes.

Q. You have two sisters? A. Yes, and a brother, a mother and a father.

Q. Where do your sisters live? A. In Brooklyn.

Q. And your brother, where is he? A. In the service.

Q. And what is your business? A. I am a bookkeeper and secretary for Plymouth Thread and Yarn Company.

Q. Who is the head of that? A. Samuel Bayer. 2744

Q. When did you start to work for Samuel Bayer? A. Six years ago.

Q. Where is the place of business? A. 30 West 21st Street, in New York City.

Q. Is that just off Broadway? A. No, that's off Fifth Avenue, sir; between Fifth and Sixth Avenues.

Q. Where is the place of business, is it on the first floor? A. On the first floor.

Q. Where is the office located? A. At 30 West 21st Street.

Q. Is it located on the first floor or second floor, the office? A. You would call it the second floor.

Q. Well, I will call it what it is. Is it the first or second floor? A. It is the second floor.

Q. And is the place of business below the office? A. No, 2745 sir.

Q. Then is the place of business on the first floor or the second floor? A. The second floor.

Q. And how many offices are there there? A. Four offices.

Q. How many employees are there there, approximately? A. About sixteen.

2746 *Anne Solomon—For Defts. Bayer—Direct.*

Q. And the offices where you work are how far removed from the office of Samuel Bayer? A. Well, the office I work in is the next office.

Q. Will you describe the office of Samuel Bayer as to its dimensions, very briefly? A. It is about fifteen by eighteen, I believe.

Q. And it contains a desk? A. It contains two desks, a file, three chairs and a couch.

Q. And a cabinet? A. A file cabinet.

Q. And what were your duties as an employee of the Plymouth Thread Company? A. I am head bookkeeper and secretary at Plymouth Thread and Yarn Company.

2747

Mr. Robb: What was that again?

Mr. Keenan: Head bookkeeper and secretary.

Q. For whom do you seive in your work? A. Samuel Bayer.

Q. You take his dictation? A. Yes, sir.

Q. You write letters? A. Occasionally, sir.

Q. And do you have a telephone girl there? A. Yes, sir, I have a switchboard operator.

Q. Is it a large switchboard? A. It is a plug board; it has four wires.

Q. Four lines? A. That's right, sir.

Q. What is the nature of the business of the Plymouth Thread Company, very briefly? A. Well, we are jobbers
2748 of sewing thread. We ship and sell sewing thread.

Q. What is your compensation in that work? A. $60 a week.

Q. What did you get when you started there first? A. $18 a week.

Q. Do you have any interest in the concern at all? A. No, sir.

Q. Are you anything other than a paid employee? A. No, sir.

Q. Who else has his office there besides Samuel Bayer? A. The salesmen have an office. There is an office there for Louis Goldsmith, who is an associate of Mr. Bayer.

Q. Louis Goldsmith? A. That's right. And Elias Bayer has an office there.

Q. Are they large offices, medium size, or small? A. They are medium size offices.

Q. Do you know the members of the Bayer family? A. Yes, I do, sir.

Q. Have you spent some time at Mr. Bayer's home? A. Yes, I have.

Q. With Mrs. Bayer and Mr. Bayer? A. Yes, sir; and his children. 2750

Q. Do you know his children? A. I know them very well, sir.

Q. And they are three in number? A. Three sons.

Q. What are their names and ages, as you know them? A. Robert is 26; Martin is 21; and Sanford is 18.

Q. I will ask you about your custom in the office when calls are received. When Mr. Bayer is called, as his secretary do you get on the line? A. I get on the line, yes, sir.

Q. Would you tell us something about that? A. When Mr. Bayer received a call I get on the line first to find out who is calling, and then I listen in to his conversation. If it is a mill man who is calling, I usually listen in. If the man wants some information, I have it on hand, and if a customer calls, I usually write out the orders, if the customer gives an order over the telephone. I listen in on 2751 practically all of Mr. Bayer's telephone conversations.

Q. Does Mr. Bayer read and write facilely? A. No, sir.

Q. Has it been necessary for you in your work on that account to pay especial attention to taking orders over the phone? A. Yes, sir.

Q. And making notations? A. Yes, sir.

Q. And is the fact that you are on the wire secret, or do you make comments? A. It is known to everybody, to both the people on the other end of the wire and to Mr. Bayer.

Q. It is a business custom in your office? A. That is right, sir.

Q. Is Elias Bayer connected with the Plymouth Thread Company, do you know, or what is his connection with it? A. Elias Bayer is connected with Thread Converters, Inc.

Q. That is another company? A. Yes, sir.

Q. Do you recall the time when Martin Bayer enlisted in the Army? A. Yes, I do, sir.

Q. Did you know about his enlistment? A. Yes, sir.

2753 Q. That he had enlisted? A. Yes, I knew that he had enlisted.

Q. And did you at that time go frequently to the home of Mr. Bayer to visit? A. Yes, sir.

Q. And do some work there in the evenings? A. Yes, sir.

Q. By the way, have you seen a great deal of Mrs. Bayer? A. Yes, I have.

Q. Her name is Blanche, is it? A. Blanche Bayer.

Q. You have gone around with her from one place to another? A. Yes, sir.

Q. You have gone around with her in town and had meals with her? A. Yes, sir.

Q. And you are, to such an extent, accepted as a member of the family, is that correct? A. I am.

2754 Q. Now, Miss Solomon, do you recall any officers coming in to visit in the office? A. Yes, sir.

Q. Would you tell us when that started, as you best recall? A. I believe it started in about April of 1942.

Q. April, 1942? A. Yes, sir.

Q. Who was the first officer that you saw in April of 1942? A. I saw two officers at that time, a Lieutenant Roeser, and I don't recall whether Colonel Jacobson or Colonel Vidal came in with him at that time.

Q. And you feel quite confident that was 1942, do you? A. Yes, sir.

Q. Was it after Martin went in the Army, or before? A. I am sorry, it is 1943, because Martin went into the Army in December of 1942.

Q. In answering my questions, I would ask you to confine yourself, please, to what you saw and heard in your presence? A. Yes, sir.

Q. Rather than information you may have gained from discussions with people or in the newspapers; is that correct? A. Yes, sir.

Q. Will you describe the first time you saw anyone of these officers come in, as you stated, I think, in 1943, in 2756
April, or about that time. Tell us who they were that came in first, and how they came in, or who accompanied them, if anyone? A. Lieutenant Roeser, and as I said, either Colonel Vidal or Colonel Jacobson, were the first two officers who had come into the office.

Q. Did you meet them? A. Yes, I met them the first day they came in.

Q. And did anyone introduce them to you? A. Elias Bayer introduced me to them.

Q. And did they stay very long, or what happened on that visit? A. They stayed there a short time and they left. There was a discussion of topics of the day; most probably the war situation, and they stayed about a half an hour and left after that.

Q. Did you engage in any conversation with them, with 2757
out telling us what you said? A. Yes.

Q. Was it your habit to converse with them when they came in? A. Yes, sir.

Q. And do you know whether on that occasion in April, 1943, when Lieutenant Roeser came in—are you sure that Roeser was the first man? A. Yes, sir.

Q. But, as I understand it, you are not sure of Colonel Vidal or Lieutenant Colonel Jacobson accompanying him? A. That is right, sir.

Q. It was one of the two, or perhaps both? A. No, one of the two, sir.

Q. Without telling us what any conversation was, will you tell us whether there was anything said that you recall in any manner or fashion having to do with any of the sons of Samuel Bayer? A. No, sir, not that I recall.

Q. Do you remember any subject matter that did come up particularly at that time? A. No, sir.

Q. It was an incidental social call? A. That is right, sir.

Q. Then when else did anything happen that challenged your attention with reference to officers coming in? A.
2759 Well, a few days after that, or a short time after that, Lieutenant Roeser came in with another officer, which was either Lieutenant Colonel Jacobson or Colonel Vidal, because I don't recall who walked in with Lieutenant Roeser the first time.

Q. But whoever it was, if it was Colonel Vidal who came in the first time—and we will leave out the Lieutenant in Colonel—or Colonel Jacobson, it was the other man who came in the second time? A. That's right, sir.

Q. Can you describe to us the approximate interval of time between those visits? A. I don't recall, sir.

Q. Would it be a matter of weeks or days, or do you recall at all, or can you help us on that? A. I don't recall.

Q. All right. Do you recall at that time, at the second visit, any particular matter being discussed? A. No, sir.
2760 Q. Now, to point to some matter, I am asking you now was anything said about any uniforms? Was that subject matter raised at all? A. Not that I recall, sir.

Q. Then what happened the next time? A. Well, one day Colonel Jacobson walked into Mr. Bayer's office and Mr. Bayer had the pictures of two of his sons on the wall.

Q. Of the two sons? A. Yes.

Q. What two sons? A. Robert Bayer and Martin Bayer.

Q. The younger one was about how old then, Sanford? A. Sixteen years of age.

Q. Go on with your story? A. When Colonel Jacobson saw the pictures of the boys on the wall, he asked Mr. Bayer where the boys were stationed, and Mr. Bayer told him that Robert at that time was stationed in Middletown, that is in Pennsylvania, and that Martin was stationed in Mitchel Field.

Colonel Jacobson then asked Mr. Bayer what duties Martin performed at Mitchel Field. He told him he was a clerk. Colonel Jacobson then mentioned that he needed clerks in his department, and that he would ask for the transfer of Martin. Mr. Bayer mentioned to him that he 2762
also had a nephew at the field, and he said he would ask for the transfer of both of the boys to his department.

Q. May I ask you if you had knowledge of these two boys, Martin Bayer and Melvin Usdan, as cousins, as to whether or not they were together a great deal before they went in the Army? A. They were friendly. They lived next door to one another.

Q. Do you know or do you happen to know whether or not they went into the Army at the same time? A. They did go in at the same time.

Q. You have spoken about some pictures of Robert Bayer and Martin Bayer being in the office. Were they exposed to view or where? A. They were hanging on the wall. As you walked into Mr. Bayer's office you could see those two pictures. 2763

Q. And were these boys in civilian clothes or sport clothes, or what? A. They were in uniform.

Q. As soldiers of the United States? A. Yes, sir.

Q. Then what happened after this discussion you have told us about between Samuel Bayer and Colonel Jacobson? A. Well, the next thing we heard was that the boys were transferred to Colonel Jacobson's department or outfit.

Q. Now, I just asked you, please, to leave out what you had heard, and I know it is difficult with the subject matter being discussed. The next visit of anyone you saw into the office? A. After the boys were transferred to Colonel Jacobson's department, Lieutenant Roeser came up with an officer, at that time Captain Radovich, and introduced Mr. Bayer and myself to him as the commanding officer of Martin Bayer.

Q. And is this Captain Radovich that gentleman here in the court room now? A. Yes, sir, he is sitting right over there (indicating).

Q. And that is, he was first brought in by Lieutenant
2765 Roeser? A. Yes, sir.

Q. And was introduced as the commanding officer of Martin Bayer and Melvin Usdan, is that right? A. That is right.

Q. Roeser introduced Captain Radovich to Samuel Bayer? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. And while you were there? A. Yes, sir.

Q. Was there a conversation that took place then? A. Just a general conversation.

Q. You don't recall any particular subject matter being discussed? A. No, I don't.

Q. Then thereafter did Captain Radovich come in again? A. Yes.

Q. Or did he stop then? A. No, he came in and called
2766 on the telephone very often.

Q. Who do you mean, he called on the telephone? Do you mean that he used the phone when he came in? A. No, he called Mr. Bayer to say hello to him, if he didn't come into the office to say hello to him at the office.

Q. Would you get such telephone calls yourself? A. Yes, sir.

Q. You would answer the phone? A. Yes, sir.

Q. And when he came in there were you present at the various times? A. Yes, sir.

Q. By the way, did your duties keep you pretty constantly in the office? A. Most of the time, sir.

Q. You have told us that the original visit of these officers started some time in April of 1943? A. That is right.

Q. Will you give us the best approximation you can of the time when Captain Radovich first came into the office? A. Either the latter part of April or the early part of May, 1943.

Q. And then those visits afterwards were they frequent or infrequent? A. Frequent visits.

Q. What would you mean by frequent? What would you describe that to be? A. Well, about four or five times a week. 2768

Q. Four or five times a week or a month? A. A week.

Q. A week? A. Yes.

Q. When these visits were made, were they lengthy visits, were they just for a moment or two, or did they vary? Tell the Court and jury, please, about them in that respect. A. These visits varied. Sometimes Captain Radovich came in and stayed five or ten minutes, and then sometimes he would come in and stay a half hour, and sometimes a little longer.

Q. And when he came in do you know what means of locomotion he used to get there? A. He usually used a staff car.

Q. Did he drive it himself? A. No, sir, he had a boy drive it for him. 2769

Q. Where would the car be in the interim while he was up visiting in the office? A. Parked in front of the building.

Q. Was that a rare occasion or a frequent occasion? A. A frequent occasion.

Q. How long did that go on, Miss Solomon, those frequent visits of Captain Radovich into the office of Samuel

Bayer? A. They went on until some time in August, I believe.

Q. Of what year? A. Of 1943.

Q. So your best description is that they started some time late in April or early in May? A. Yes, sir.

Q. And continued until the latter part of August? A. August some time, around then.

Q. Some time in August? A. Yes, sir.

Q. Do you remember at any time any discussions about any uniforms being acquired there during these visits of Captain Radovich's? A. Yes. I received an invoice from I. Buss Uniform Company one day and I asked Mr. Bayer

2771 what this invoice——

Q. Don't tell us what he said. Did you receive an invoice? A. Yes, sir.

Q. Was that the first you knew about it? A. Yes, sir.

Q. So, any conversations that took place about uniforms or acquiring them, you don't know about? A. No, sir.

Q. All right. Now do you remember any occasion in particular when Captain Radovich came in that stands out in your memory for any reason? A. Yes. Captain Radovich came in one morning and told Mr. Bayer—I was in the office and so was Elias Bayer—that his outfit was breaking up and that he was sending the boys to an overseas outfit.

Q. And when was that, do you think? A. In the summer of 1943.

2772 Q. What if anything did Samuel Bayer say? A. Mr. Bayer asked him if he could possibly have the boys transferred to another outfit on the field, and he said he couldn't do that.

Q. He said he could or could not? A. Could not.

Q. He could not do it. Was anything further said about it that day? A. No, sir.

Q. Then did anything happen with reference to that, thereafter, to your knowledge? A. Captain Radovich came

in the next day and told Mr. Bayer that he had an angle, that he could have the boys transferred to the Medical Corps at Mitchel Field. Mr. Bayer thanked him and then Captain Radovich asked Mr. Bayer if he could see him personally.

Q. Before we get to that, Miss Solomon, had Mr. Bayer been out visiting or entertaining Captain Radovich with you or anyone else to your knowledge? A. Yes, sir.

Q. What visits were made of that description prior to this particular visit where he said he had another angle? A. I don't recall if we had gone out to dinner with Captain Radovich before this conversation or after this conversation; after this conversation, but Captain Radovich and 2774
Mrs. Radovich, Mr. and Mrs. Samuel Bayer and myself had dinner one night with Captain Radovich and his wife.

Q. Where did you have that dinner? A. At the Waldorf Astoria.

Q. In the restaurant or in a room? A. In the Starlight Roof.

Q. I take it you had your dinner there. Did you go any place after dinner? A. No, sir. We spent the evening there and then we went home.

Q. Coming back to the visit, the second visit that you have spoken of, with reference to breaking up the outfit and your statement that Captain Radovich said that he thought of a new angle, what happened after that that you heard of? A. When Captain Radovich asked Mr. Bayer 2775
to see him alone Elias Bayer and I walked out of the office, and I stood right outside of Mr. Bayer's office at the time—

Q. Why? A. Well, because Captain Radovich had never before asked Mr. Bayer to see him personally, and I was just wondering what the conversation was going to be because he said he had an angle and to have the boys transferred to the Medical Corps.

Q. Did you hear what was said? A. Yes, sir. Captain Radovich asked Mr. Bayer to please give him $500 as he had to send his wife back to California.

Q. What did Samuel Bayer say? A. Samuel Bayer told him he didn't have the money and would try to raise it and try to give it to him.

Q. Did you hear any subsequent conversations between Captain Radovich and Samuel Bayer about money? A. Yes. Some time after that.

Q. How long after that? A. A few days.

Q. What other conversation did you hear? A. Captain Radovich came in again and after talking to Mr. Bayer in the presence of Elias Bayer and myself he asked to see him again personally, and after I walked out I heard him ask Mr. Bayer for $500 more.

2777 Q. What did Mr. Bayer say? A. Mr. Bayer told him he didn't have the money and didn't know if he could raise it.

Q. Was anything further said, any other request or demands for money? A. Yes. There was a request a few days after that for $1,000.

Q. Who made that? A. Captain Radovich.

Q. What did Mr. Bayer say? A. Mr. Bayer said he didn't have the money and didn't know where he could raise that money.

Q. If any money was passed, were you present at any such time? A. No, sir.

Q. Did you see much of Major Radovich after these visits that you have spoken of? A. Yes, he came in often.

Q. Was there a time when he ceased to come in regularly? A. After the boys were transferred out of Mitchel

2778 Field.

Q. After the boys were transferred out of Mitchel Field? A. Yes, sir.

Q. What happened then? A. Well, after the boys were transferred out of Mitchel Field, Captain Radovich called the office one day and told Mr. Bayer that he knew who had the boys transferred out of Mitchel Field.

Q. Did you hear the conversation? A. Yes, sir.

Q. Were you on the telephone? A. Yes, sir.

Q. And what else was said? A. And he said that if Mr. Bayer would give him $1500 he could have the boys sent back to Mitchel Field. Mr. Bayer asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station.

Q. Did you hear any other conversations of that nature? A. Yes. One morning Captain Radovich called from Washington——

Q. Long distance call? A. Yes, sir.

Q. And whom did he call for? A. I don't recall whether he called for Mr. Bayer or myself, but I spoke to Captain Radovich at the time. 2780

Mr. McGohey: Could we have the time of this fixed, please?

Mr. Keenan: Yes.

Q. Fix the time of it as best you can. A. I think it was in November of 1943.

Q. What did he say over the phone? A. He told me that he had to see Mr. Bayer, it was very important, and for Mr. Bayer to meet him at Cavanagh's, that is a restaurant on 23rd Street and Eighth Avenue, for lunch.

Q. Was there any meeting before that? A. Yes, there was a meeting about six—I wouldn't call it a meeting; there was an appointment made.

Q. How long before that? A. About six weeks before 2781 that.

Q. Will you tell us about that, if you know? A. Captain Radovich called one day and Mr. Bayer was either out or on a long distance call, and I spoke to him, and he told me that he would like to meet Mr. Bayer at the McAlpin Hotel that evening for dinner.

Q. Did you tell that to Mr. Bayer? A. Yes, I did.

Q. Did you go with him? A. Yes, I did.

Q. Who was there? A. Captain Radovich, another officer, Mr. Bayer and myself.

Q. What was the rank of the other officer, if you know? A. He was either a first lieutenant or a second lieutenant; I don't recall.

Q. Did you dine together? A. Yes, sir, we had dinner together.

Q. Was any statement made by Captain Radovich about what he was doing then? A. Yes. At the time Captain Radovich was registering at the hotel I was standing near him and he had pulled out a mimeographed sheet and showed me some of his orders, and I didn't understand the
2783 abbreviations of them.

Q. You couldn't understand the abbreviations? A. That is right, sir.

Q. What did he say they were? A. He told me that he had authority to take any plane to travel any place in the country.

Q. Is that all? A. That is all, sir.

Q. Was there anything else of significance that took place at that time, that you recall, at the McAlpin? A. No, sir.

Q. Then the next time I think you have told us was when he called up; and you made an appointment for Cavanagh's Restaurant? A. Yes, sir.

Q. Mr. Bayer was not there then? A. No, he was not at the office then.

2784 Q. But you made the appointment for him? A. Yes, sir.

Q. And did you keep it with him? A. Yes, sir, we did.

Q. Who was present at Cavanagh's Restaurant? A. Mr. Bayer, Captain Radovich and myself.

Q. Just the three of you? A. Yes, sir.

Q. Was there conversation that took place then? A. Yes. Captain Radovich told Mr. Bayer at that time that he was going on a very dangerous mission to the Burma-India front and that this mission would write history, and

if the boys were lucky enough to return they would return in eight months, that is how long that mission was to take. And he then told us that he had sent a radiogram to take both Melvin Usdan and Martin Bayer into this company that he was in.

Q. What did Samuel Bayer say? A. Samuel Bayer asked him why he did that, what he wanted from his life, because he said he never did him any harm, and asked him why he was taking it out on the boys by taking the boys into this dangerous outfit.

Q. What did Captain Radovich say? A. Captain Radovich said he had the authority to do it and he could do anything he wanted, and that if Mr. Bayer would give him 2786
$5,000 he could have this—the boys transferred out of this outfit into some other outfit, and for Mr. Bayer not to think he was going to keep all that money himself—he had to give $2,000 to one man and $1500 to another man, and then he would only have $1500 for himself.

Q. What did Samuel Bayer say to that? A. Samuel Bayer at that time told him that he didn't have that kind of money and didn't know where he could raise it. Captain Radovich told him then that he knew he was a rich man and could put his hands on any kind of money.

Q. By the way, can you tell us what the approximate wealth of Samuel Bayer is? A. About a hundred thousand dollars.

Q. You keep his books and records? A. Yes, sir.

Q. Was there anything more said at that meeting at the 2787
Cavanagh Restaurant? A. Mr. Bayer again pleaded with him and told him that he couldn't possibly raise that kind of money. And he said he was awfully sorry, if he couldn't raise the money the boys would have to go with him on this dangerous mission, and for him not to worry because maybe if the boys were lucky they would come home alive.

Q. At that time do you know whether Samuel Bayer had any information about any movement of his boys from

where they were? A. Martin Bayer had called that morning and had told his father that he and his cousin, Melvin Usdan, were being transferred to Goldsboro, North Carolina.

Q. Did you see Captain Radovich after that? A. Yes. I saw him the following day.

Q. Where? A. At our office.

Q. What time of day? A. I believe it was in the morning.

Q. Was there a conversation that took place in your presence then? A. Yes. Captain Radovich asked Mr. Bayer if he had made a decision about giving him the
2789 $5,000, and again Mr. Bayer told him that he didn't have that money. And he said if he didn't give it to him he would take the boys with him. And he repeated the conversation about not keeping all that money for himself.

Mr. McGohey: Pardon me. May I have the date fixed of this second conversation?

Mr. Keenan: She said the day after the Cavanagh Restaurant meeting.

Mr. McGohey: Oh.

Q. Is that right? A. Yes, sir.

Q. Then did you see Major Radovich after that? A. No. That was the last time I saw Major Radovich.

Q. Do you know where he went when he left the office?
2790 A. He walked out of the office and Elias Bayer walked after him.

Q. That is the last you saw him? A. Yes, sir.

Mr. Keenan: You may have the witness.

The Court: Do you wish to ask any questions?

Mr. Robb: I don't know what order your Honor has been following on this.

The Court: I think you had better examine the witness.

*Cross-examination by Mr. Robb.*

Q. How long have you worked for Samuel Bayer? A. Six years.

Q. Six years? A. Yes, sir.

Q. Is that the first job that you had? A. No, sir.

Q. Can you describe this office of Mr. Samuel Bayer's, the particular office in which he had his desk? A. Well, the office was an office—I believe it was about 15 by 18. It has two desks in it, a file cabinet, three chairs and a couch.

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Q. Where was Mr. Samuel Bayer's desk with respect to the window? A. Facing—I would say the window (indicating) was the door and Mr. Bayer's desk was facing the door.

Q. The window and the door were in line? A. There was no window in his office.

Q. Oh, there was no window? A. No, sir.

Q. Where was the desk then with respect to the door? A. It faced the door.

Q. How far from the door was it? A. Oh, I don't know.

Q. Can't you give us an approximation? A. I don't know.

Q. Was it on the opposite side of the room? A. Yes, sir.

Q. So, if the room was 15 feet square, it was approximately 15 feet from the door, is that correct? A. I wouldn't say that, because the desk takes up some part of the space.

2793

Q. Then, that door opened into a hallway? A. It opens out, yes.

Q. Is it a glass door? A. It is pane glass; you can't see through the glass, though.

Q. Now, Miss Solomon, coming to your testimony about the conversation you say you overheard between Captain Radovich and Samuel Bayer, was that the first time that

anybody had ever asked to speak to Mr. Samuel Bayer privately? A. Yes, sir.

Q. The first time in all your six years there? A. Yes, sir.

Q. Nobody had ever done that before? A. No, sir.

Q. Is it your custom always to listen to conversations between Mr. Samuel Bayer and anybody who is talking to him? A. Yes, sir.

Q. Why is that? A. Well, if it is a customer who walks in I usually write the orders, or if it is over the telephone I take the orders over the telephone.

Q. Yes. But doesn't Mr. Samuel Bayer have other visi-
2795 tors besides customers? A. Well, he has—no, he don't; very few social calls.

Q. When he has social callers do you listen to those conversations too? A. Over the telephone or in the office.

Q. You do? A. Yes.

Q. That is the rule of your office? A. Yes.

Q. Samuel Bayer is not to speak to anyone alone, is that right? A. No, I wouldn't say that; but I usually pick up the telephone first and then I listen into the calls.

Q. Yes. Now, suppose somebody came in to see Mr. Bayer on a social visit, would you be there, too, listening to the conversation? A. I would walk in to say hello to the people and if the conversation was of no interest to me or didn't refer to any business and I was busy in my office, I would walk out.

2796 Q. How would you decide whether the conversation interested you or not? A. Well, after hearing the gentleman talk I would know whether I was interested in that conversation, if they were talking about people I didn't know, I wasn't interested in it.

Q. When you say you listened at the outside of this door to hear this conversation, was anybody with you when you were listening? A. Elias Bayer.

Q. What particular part of the door were you listening at? A. I was listening right outside the door.

Q. But what particular part of the door? The keyhole, or where? A. No. The door was open. It wasn't the keyhole.

Q. Oh, the door was wide open? A. Yes.

Q. You were just standing in the door? A. I wasn't standing in the door. I was standing at the side of the door.

Q. In other words, the door wasn't closed; you didn't close the door when you went out? A. No, sir.

Q. Were you and Mr. Bayer—Mr. Elias Bayer—standing on the same side of the door? A. Mr. Samuel Bayer 2798
was in the room.

Q. Mr. Elias Bayer. A. Yes, sir.

Q. He was standing on the same side of the door? A. Yes, sir.

Q. Which one was standing next to the door jamb, you or Mr. Elias? A. I was.

Q. You were. And he was standing— A. Next to me.

Q. Next to you. You had your ears like this (indicating), did you? A. It wasn't necessary to do that.

Q. It wasn't necessary? A. No, sir.

Q. In other words, these people talked in ordinary voices, is that right? A. That is right, sir.

Q. Loud voices? A. No. Ordinary speaking voices.

Q. They could have seen you if they had looked out 2799
there? A. No, they couldn't have.

Q. You were hiding, is that right? A. I wasn't hiding. I was just standing on the side of the door.

Q. How long would you say you stood there? A. Just a few minutes.

Q. How many? A. I couldn't remember that, sir.

Q. You remember what was said pretty well, don't you? A. Yes. I remember what was said because it was a conversation one does remember.

Q. When did you go back in the room? A. As Captain Radovich was walking out of the office, as he went across the threshold, I walked into the office.

Q. Did you greet him? A. I said "Good bye" to him, yes.

Q. How about Mr. Elias Bayer, did he walk in too? A. Yes, sir.

Q. In other words, you were eavesdropping? A. Well, if you want to call it that. I was curious——

Q. Is that your testimony? A. Yes. (Continuing) —to know what the conversation was all about.

Q. It wasn't any business of yours? A. No, it wasn't any business of mine, but Captain Radovich never had
2801 asked Mr. Bayer to see him alone personally.

Q. Nobody else ever had either? A. No, sir.

Q. In all the six years you had been there? A. Yes, sir.

Q. Do you know whether or not Samuel Bayer paid for some uniforms for some other officers besides Major Radovich? A. Yes, I do, sir.

Q. He did it, is that right? A. I didn't—will you please repeat that?

Q. Do you know whether Samuel Bayer paid for some uniforms for other officers besides Captain Radovich? A. Yes, he did.

Q. Who were they? A. Colonel Jacobson, Colonel Vidal, and Lieutenant Roeser.

Q. Do you know whether or not he gave—by "he" I mean Samuel Bayer—gave other presents to Colonel Jacobson?
2802 A. No, sir.

Q. You don't know that? A. No, sir.

Q. Were you present when Samuel Bayer and Elias Bayer gave a statement to Colonel Snyder in your office? A. I was not there present at the time of the giving of the statement, but I had typed up the statement after they had given it to them.

Q. Did you also make a statement to Colonel Snyder? A. No, sir.

Q. Did he question you about this matter at all? A. No, sir.

Q. Never asked you about it? A. No, sir.

Q. And of course you didn't tell him about it, did you? A. No, sir.

Q. Did you know at that time what he was investigating? A. Well, he had told Mr. Bayer that—as he walked in I heard him tell Mr. Bayer that he had come in to ask him some questions about this Radovich case.

Q. What did you do then? A. I walked out of the office. Colonel Snyder, I believe, asked me to walk out of the office.

Q. Did you listen outside the door to that conversation? 2804
A. No, sir.

Q. You didn't eavesdrop on that one? A. No, because the door was closed.

Q. Oh. Who closed it? A. I don't know. I wasn't inside the room to see who closed it.

Q. How about that conversation, Miss Solomon? Did that conversation interest you too? A. Well, while—after I typed up——

Q. No. Did the conversation interest you at the time you walked out of the door? A. Yes, I was interested to know what was being said.

Q. But you didn't stand outside the door, is that right? A. When the door is closed I don't believe you could hear through it.

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Q. Did you try? A. No, sir.

Q. That was the second time somebody asked to speak to Mr. Bayer privately, wasn't it? A. Yes, sir.

Q. You typed up Mr. Bayer's statement? A. Samuel Bayer's and Elias Bayer's statements.

Q. You knew that these statements were under oath, didn't you? A. Well, the dictation said so.

Q. Were those statements the truth? A. No, sir.

Q. Did you tell Colonel Snyder that? A. No, sir.

Q. You were trying to protect Mr. Samuel Bayer, weren't you? A. I wasn't asked.

Q. But you didn't tell him, did you? A. I wasn't asked, sir.

Q. Won't you answer the question? A. No, I did not.

Q. Did you tell Colonel Snyder that? A. No, sir.

Q. If he had asked you would you have told him that that wasn't the truth? A. Yes, sir.

Q. You would have told him that? A. I would have told him the truth.

Q. You would have told him Mr. Samuel Bayer was a
2807 perjurer, would you? A. Well——

Mr. Keenan: Just a moment. I object to that. I think that is offensive.

The Court: I don't think it is necessary to use language that strong in cross-examination.

Q. Miss Solomon, it is your testimony that after you say these demands were made upon Mr. Bayer you saw Captain Radovich around there frequently? A. Well, after these demands were made the boys were transferred out of—and the boys were transferred into the Medical Corps.

Q. Can you answer the question? That you saw Captain Radovich around that office frequently? A. I would have to give an explanation on that, I think, sir.

2809 Q. All right, go ahead. A. After the boys were transferred to the Medical Corps Captain Radovich came in, the boys were in the Medical Corps for about a week—after the boys were transferred out of Mitchel Field Captain Radovich didn't come in again.

Q. He did come in after you say he made this demand, didn't he? A. Which demand?

Q. Well, the first demand you have told us about. A. Yes, he did.

Q. Each time you stood outside the open door and listened? A. Well, no. There were intervals when he came in between the two demands and I stayed in the office and listened to the conversations.

Q. And the conversation was pleasant, was it? A. Yes, sir.

Q. Just a social visit? A. Well, he would tell us that the transfers are being worked on and that——

Q. Yes. But there wasn't any unpleasantness about it? A. No, sir.

Q. Nobody was offended by this demand you say he had made? 2810

Mr. Keenan: I object, your Honor. That is calling for the conclusion of the witness. He might be surprised by the answer——

The Court: I should rather think so.

Mr. Robb: I think she has answered it anyway, if your Honor please.

Q. Did you ever listen in on any phone conversations between Samuel Bayer and Colonel Jacobson? A. No, sir.

Q. You didn't listen in on those? A. I didn't know Samuel Bayer called Colonel Jacobson.

Q. Did he ever have a call from Colonel Jacobson? A. No, sir.

Q. Would you say that you are positive about that? A. I know Colonel Jacobson called Elias Bayer a number of 2811 times.

Q. But you weren't in on those calls, is that right? A. I never listened in to Elias Bayer's or anyone else's calls.

Q. You wouldn't listen— A. Only on Samuel Bayer's.

Q. Who listened in on Elias' calls? A. Nobody does.

Q. Did you ever hear of a call from Samuel Bayer—from Colonel Vidal? A. No. Colonel Vidal used to call Elias Bayer, too.

Q. How about Roeser? A. He would call Elias Bayer, too; they were his friends.

Q. You told us in some detail about the calls you would listen in on from Captain Radovich to Samuel Bayer. Now, when those calls first came in there wasn't anything unusual about them, was there? A. No.

Q. But you do recall what was said? A. Well, the first call that came in Captain Radovich said that something happened and that he had to see Mr. Bayer, and he was coming over to the office immediately.

Q. Who else called Mr. Samuel Bayer on that day? A. Oh, a lot of other people may have called him because he
2813 gets a lot of telephone calls.

Q. Can you tell us what any of those people said to Mr. Samuel Bayer? A. They were calls from customers, calls from—maybe Mrs. Bayer called. She usually calls.

Q. Did you listen in on her calls, too? A. Yes, I do.

Q. Did you make notes on what she said? A. No. I talk to her while Mr. Bayer is talking to her, too.

Q. You say you went out to dinner with Mr. and Mrs. Bayer and Captain and Mrs. Radovich, is that right? A. Yes, sir.

Q. You went up to—where is it? A. The Starlight Roof at the Waldorf-Astoria.

Q. Did you ever go out to dinner with Mr. Bayer without Mrs. Bayer? A. Yes, I did.

Q. How many times? A. I don't remember how many
2814 times, sir.

Q. Frequently? A. Not too frequently, no.

Q. And where do you say you lived? A. In Brooklyn.

Q. And are you alone or living with your family? A. I live with my family.

Q. Now, you say you went down to have lunch, I think it was luncheon or dinner, at Cavanagh's Restaurant, where you met Captain Radovich. Why did you go along

with Mr. Bayer? A. Because Captain Radovich said he would like to see Mr. Bayer for luncheon and I just followed him, went along with him. He asked me to come along with him.

Q. Do you usually go out to luncheon with Mr. Bayer? A. Yes, I have lunched with him very often.

Q. Very frequently? A. Yes, sir.

Q. Where is Cavanagh's Restaurant with respect to your place of business? A. Two street blocks and two and a half avenue streets.

Q. Who paid the check at that luncheon? A. I did.

Q. You did. Your money or Mr. Bayer's? A. Mr. Bayer refunded it to me. 2816

Q. Were you ever interviewed by the F.B.I. in this matter? A. Yes, I was, sir.

Q. When? A. I believe it was a year ago October or November. I don't recall exactly.

Q. You told them at that time that you didn't know anything about it, didn't you? A. No, sir. I gave him a whole detailed report of it, everything that I could recall.

Q. Have you discussed with Mr. Bayer what your testimony was going to be in this case? A. No, sir.

Q. You haven't talked to him about it at all? A. Well, we spoke about the case, yes.

Q. Did you talk to Mr. Bayer about the case before you talked to the F.B.I.? A. Well, we spoke about the case, yes.

Q. How long before you talked to the F.B.I.? A. Well, after Colonel Snyder came in. 2817

Q. Oh, then you talked to Mr. Bayer about the case, is that right? A. Yes, sir.

Q. And at that time did you discuss what you were going to tell the F.B.I.? A. No, sir.

Q. When did you talk about the F.B.I. with Mr. Bayer? A. We never discussed what I was going to tell the F.B.I. Mr. Bayer told me to tell them the truth, and that is all.

Q. Did you ever have any discussion with Bayer about whether or not he would try to put the burden of this case on Captain Radovich? A. No, sir.

Q. Never discussed that? A. No, sir.

Q. Never discussed with Mr. Bayer whether or not you would try to make the jury believe that Captain Radovich was an extortionist, did you? A. No, sir.

Mr. Keenan: Just a moment. I object to that, to the form of the question.

The Court: She is being cross-examined. I will overrule that objection.

2819

Q. You never discussed with Mr. Bayer whether or not to save himself he would try to accuse Captain Radovich of extortion? A. No, sir.

Q. And, of course, you would not tell an untruth to help Mr. Bayer, would you? A. I would not, sir.

The Court: Are there any further questions?

Q. By the way, Miss Solomon, did you ever go on any trips with Mr. Samuel Bayer? A. Yes, sir.

Q. Where? A. North Carolina.

Q. Where in North Carolina? A. Charlotte, North Carolina, and in that vicinity.

Q. How often did you go down there? A. About once

2820 a month.

Q. How long would you stay? A. A few days.

Q. Pardon? A. A few days.

Q. And then you would come back? A. Yes, sir. Mr. Bayer has a mill down there.

Q. Did you ever go to Florida with him? A. No, sir.

Mr. Robb: That is all.

The Court: Do you wish to cross-examine?

Mr. McGohey: No cross-examination.

The Court: Any redirect examination?

Mr. Keenan: Just a question.

*Redirect examination by Mr. Keenan.*

Q. Miss Solomon, the story that you gave to the Federal Bureau of Investigation, when was that given? A. I believe it was last year, October or November of last year. I gave it to Mr. Wallace.

Q. Mr. Wallace? A. Mr. Wallace was there, and Mr. Flynn and Mr. Brown.

Q. Mr. Flynn. Do you see Mr. Flynn in the courtroom? 2822
A. Yes. Mr. Flynn is over there (indicating).

Q. And Mr. Wallace, who is he here? A. Sitting in the center (indicating).

Q. How long were you there with the F.B.I. agents, Mr. Flynn and Mr. Brown? A. From about 10 o'clock in the morning until about 4.30 or 5 in the evening.

Q. And did you answer all the questions they asked you? A. I did, sir.

Q. And did you refuse to answer any of them? A. No, sir.

Q. Did you answer any of them falsely that you know of? A. No, sir.

Q. Now, there has been a good deal of talk or there has been some talk about some trips which you made with Mr. Bayer. Has there ever been any wrongful conduct of any 2823
kind between Mr. Bayer and yourself? A. No, sir.

Q. At any time? A. No, sir.

Q. Were these trips made with the knowledge of Mrs. Bayer? A. Yes. She went with us on some of those trips.

Q. And you have been asked whether or not you would tell any story to throw the blame on any other soldiers for what Mr. Bayer did. I will ask you if you would perjure yourself for anyone? A. I would not, sir.

Q. And was the statement written up that you gave to the F.B.I. agents, do you know? A. Yes, there was a stenographer taking the dictation.

Q. And that took from 10 o'clock in the morning until late in the afternoon? A. That is right, sir.

Q. And were you asked to come down at any later date? A. No, sir.

Q. Were you asked questions about your relations with Samuel Bayer at that time? A. I was, sir.

Q. Whether or not they were chaste and decent? A. That's right.

Q. And did you reply then? A. I did, sir.

2825 Q. Are you willing to answer any questions about any trips you made with anybody in your life? A. Yes, sir.

Q. Any place? A. Yes, sir.

Q. As to whether or not you are a decent woman? A. I am, sir.

Mr. Keenan: That is all.

*Recross-examination by Mr. Robb.*

Q. Miss Solomon, this time that you made the statement to Mr. Wallace, was that after Samuel Bayer had made a statement to him? A. No, sir. It was before Samuel Bayer had made a statement to him.

Q. How long before? A. I don't recall.

2826 Q. Was it a matter of days or weeks or months? A. I think it was weeks.

Q. Weeks? A. Yes.

Q. And had you talked at that time with Mr. Keenan? A. At the time I made the statement?

Q. Yes. A. I don't believe I had known Mr. Keenan then.

Q. You talked with Mr. Samuel Bayer before you went in, did you not? A. The only thing I spoke to him about was that he knew I was going down there.

Mr. Robb: Yes.

The Court: Is that all?

Mr. Robb: That is all.

Mr. McGohey: May I at this point ask just one or two questions?

The Court: Have you something further, Mr. Keenan?

Mr. Keenan: No, I thought they were all through with the witness. 2828

The Court: If you have a question, you may ask her.

*Recross-examination by Mr. McGohey.*

Q. You have testified, Miss Solomon, that you were examined and that you answered all of the questions that were asked of you? A. I did.

Q. And that was in Mr. Wallace's office? A. Yes.

Q. Was that the first time you were in Mr. Wallace's office? A. Yes, sir.

Q. Had you not been there on one occasion before that? A. No, sir.

Q. Were you ever in Mr. Wallace's office accompanied by Mr. Cohen? A. I don't believe this was Mr. Wallace's 2829 office. The first time I was in that building was in a small office, and then the second time I was in a much larger office.

Q. Well, weren't you interviewed some time by Mr. Wallace prior to the time that you answered all these questions? A. Yes, I was.

Q. And at that time did you decline to answer any questions? A. Mr. Bayer's attorneys were there at the time.

Q. Mr. Cohen? A. Yes, sir.

Q. Were you advised by them not to answer any questions? A. Yes, sir.

Q. And you did not answer any questions? A. Yes, sir.

Q. And the interview then terminated? A. That is right.

Q. It was some time after that that you came in and answered questions? A. Yes, sir.

Q. How long after your first visit did you come in and answer questions, if you recall? A. I don't recall.

Q. Would it be a couple of weeks, or three weeks? A. It was a matter of weeks, I believe.

Q. Some weeks? A. Yes, sir.

2831

The Court: Any further questions?

Mr. McGohey: Yes, your Honor.

Q. Now, between the first visit and the second visit, Miss Solomon, did you see Martin Bayer, young Martin Bayer, the soldier? A. I don't remember, sir. I believe I did. I believe after the first visit I had gone to North Carolina and Martin Bayer was at Greensboro at that time.

Q. Were you accompanied by anybody when you went to Greensboro? A. Mr. Bayer.

Q. You and Mr. Bayer together saw Martin Bayer? A. Yes, sir.

Q. Did you have any conversation about this case? A. Well, Martin Bayer had told his father that he was ques-
2832 tioned, and he asked his father what it was all about, and his father had told him there was nothing to any of the questioning and to just answer the truth.

Q. But you talked to him about this case? A. Martin Bayer, no, sir.

Q. I say you and Mr. Bayer talked with Martin Bayer about this case? A. Martin Bayer asked what all the questioning was about.

Q. Yes, and then it was subsequent to that that you came back to New York and then came in and answered these questions, is that correct? A. That's right.

Mr. McGohey: I have no further questions.

Mr. Keenan: One question.

*Redirect examination by Mr. Keenan.*

Q. Where was Martin Bayer at that time? A. He was in the hospital in Greensboro. He had contracted pneumonia and was very sick in the hospital.

Q. During that time? A. Yes, sir. 2834

Mr. Keenan: That is all, your Honor.

The Court: All right, you will be excused. Is there anything further?

Mr. Keenan: Your Honor, at this time the defendants Bayer, having already given their testimony through the lips of the exhibits——

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: —we rest.

Mr. Robb: We object to that, if the Court please.

Mr. Keenan: Wait a minute. You object to it?

Mr. McGohey: I object to any speeches of this kind, your Honor.

The Court: Yes. Do you rest?

Mr. Keenan: I have not rested, your Honor, if there 2835
is an objection to that speech. Is there any objection to it?

Mr. Robb: Yes, sir, I object to it.

Mr. McGohey: My objection has been made.

Mr. Keenan: I want to know what the ground of it is.

The Court: Whether or not there is an objection, I am going to strike it out. I asked the question whether you wished to rest or not.

Mr. Keenan: Your Honor, we rest.

The Court: Now you gentlemen, counsel for the defendant Radovich, have you anything further to offer?

Mr. Ansell: We have nothing further.

The Court: Have you any rebuttal?

Mr. McGohey: The Government has no rebuttal, your Honor.

The Court: Then pursuant to the plan we agreed upon yesterday afternoon, gentlemen, if I recall correctly, I may now, pursuant to our understanding, discharge the jury until Monday morning. Does that
2837 accord with your understanding?

Mr. Ansell: That was my understanding.

Mr. Keenan: That is our understanding, your Honor.

Mr. McGohey: And the Government's, also.

The Court: Ladies and gentlemen of the jury, the situation is a little bit peculiar. Frankly, if I were home down in the Western District of Virginia, I would have finished this case this week, but I understand that it is your practice here, or it is the practice in this District Court, not to require jurors to attend on Saturdays. I am frank to say that that is not the practice in my district. We do not keep jurors in attendance as long as you attend. You attend, if I am
2838 correct, a month at a time, and I think it is proper to follow the customs which you have, and, consequently, it is not my desire to run this case into a situation where you would have to serve all day Saturday.

So I am going to adjourn you now, the evidence having been concluded, over until Monday morning, at which time you will hear the summations of counsel followed by my charge to you as to the law, and then the case will be submitted to you for your determination.

2839

It is desirable, if it can be worked out, to submit the case to you the first thing in the morning because I understand it is extremely difficult to secure hotel accommodations, or, rather, I am told that it is impossible to accommodate jurors overnight should there be any occasion, because they just cannot find hotel rooms. And certainly it is not my purpose to submit the case to you at any such hour where you might be required to spend a night in the jury room. So I am undertaking to arrange it so that the case may be submitted to you for your consideration the first thing in the morning.

2840

I wish it were so that we could go right through with it conveniently, because I would prefer for the case to be submitted to you while the evidence is as fresh as possible in your minds. Under the circumstances, the only practical way to do it is to adjourn you now until Monday morning.

Now that the case has reached this stage, I want to again repeat what I told you when you first got in the jury box, about not discussing the case amongst yourselves, and, more particularly, not discussing it or permitting anyone outside to discuss it with you. With that, ladies and gentlemen, it being noted of record that all evidence of all parties has been submitted, and the taking of evidence concluded, I will excuse you now until Monday morning.

2841

It does not really inconvenience any of us to be here by 10 o'clock, does it?

All right, I am going to adjourn you then until Monday morning at 10 o'clock.

(Adjourned until Monday, October 22, 1945, at 10 A. M.)

New York, Monday, October 22, 1945,
10 A. M.

TRIAL RESUMED.

(The following proceedings were had in chambers, not within the presence of the jury:)

Mr. Keenan: The defendants Bayer renew the motion made at the end of the Government's case that the jury be directed to return a verdict of not guilty, and renew the request of the Court for the continuance of this cause until the return of Martin Bayer, because of the development of evidence in the case demonstrating the necessity 2843 of his appearing as a witness as to matters most material.

And the defendants Bayer move now to strike out all parts of the statement—withdraw that, let it go.

The Court: The motion of the defendant Samuel Bayer—

Mr. Keenan: Another thing I would say: Furthermore, the defendants Bayer renew their motion for dismissal on the ground that the indictment fails to state a cause of action, that if the indictment be interpreted as depending solely upon that portion of Section 88 of Title 18, having to do with defrauding the United States Government, and if it be interpreted that said section covers the alleged offense contained in the indictment, that such was the intention of Congress in enacting such Section 88 of Title 18, 2844 the same is against and in violation of the Constitution of the United States, as is demonstrated by the case of Cohen Grocery Company v. United States. I will give you the citation of that in a minute, your Honor.

The Court: All right. The motions of the defendant Samuel Bayer and Elias Bayer by counsel are overruled.

Mr. Keenan: And I would like to renew the motion on account of Elias Bayer on the ground that the evidence now shows no connection of Elias Bayer with any so-called

agreement, arrangement, confederation or conspiracy to defraud the United States.

The Court: Motion overruled.

Mr. Robb: The defendant Radovich renews the motions made at the close of the Government's case to dismiss the case and to direct a verdict in his favor upon the ground of the insufficiency of the evidence and upon the ground that the evidence now reveals that the defendant Radovich has been tried twice for the same offense.

And the defendant Radovich also renews the motion made at the close of the Government's case to strike out certain portions of the evidence which were specified in those motions. 2846

The Court: Motions of the defendant Radovich by counsel are overruled.

Now, off the record for a minute.

(Discussion off the record.)

Mr. Keenan: I want to go on the record now and I want to state to your Honor that, now that we are in chambers discussing the matter of the order of the presentation to the jury, that is, as to which of the defendants, Bayer or Radovich, shall be required to make the first summation, I want to specifically call your Honor's attention to the unique character of this prosecution, the various indictments that have been brought against the Bayers as individuals, Samuel Bayer as an individual, and against Samuel and Elias Bayer, omitting the defendant Radovich, and the peculiarity of evidence in the case brought out by Radovich's counsel to the effect that pressure was brought upon him of various natures, that he was questioned or asked, indicative of a belief of Radovich that he was indicted because of conferences that he had with the United States Attorney—the clear implication being that he was going to testify in the case, and that, a fair inference to this Court, that brought about the first four indictments against the Bayers which is now the subject matter of this 2847

prosecution; and that the real contest in this case is between Radovich and the two Bayers; that the issue, as Bayer contends in this lawsuit and as appeared in his defense, is that he was subjected to extortion as far as any payments of money were concerned.

And under those circumstances, any summation, and the order of it, is of prime importance. And I make the representation to you that General Ansell and Mr. Robb agreed with me on the order of summation, that in the event our defendants Bayer were not put on the witness stand they would precede myself as counsel for the two Bayers in summation; that there was no revision of that agreement
2849 by any statement until after the close of the case, or no statement that there would be such revision.

And therefore, in view of the fact that General Ansell and Mr. Robb apparently have mistaken the agreement as I view it, and it works a distinct hardship and militates against a fair presentation of the defense of the two defendants Bayer, I ask this Court, on this representation, for permission on that ground to reopen the defendants Bayers' defense for the purpose of permitting them to take the witness stand.

The Court: All right. I would like to hear anything you have to say.

Mr. Ansell: I have already explained to his Honor——

The Court: Pardon me, sir. You see, none of that was of record, and we are now going on the record.

2850 Mr. Ansell: Where did the record begin?

(To the reporter) Just where Mr. Keenan talked the last time.

(Record read.)

Mr. Ansell: Replying to the last part of Mr. Keenan's statement, I am required to say that, as frequently happens, counsel did not understand the agreement in the same way. Therefore, according to my understanding, and it is only out of my understanding that I can speak, there was no

agreement that fitted into the circumstances of what occurred immediately thereafter, namely, the putting on of Miss Ann Solomon, through whose lips poured the defense of the Bayers and an attack upon Major Radovich. Therefore, I do not feel myself bound by any such agreement. I had frankly wanted the case to close and get to the jury and I thought the case was to close except for character witnesses.

Number 2. So far as Radovich is concerned, if Mr. Keenan wants to reopen the case in order that the Bayers may put on their defense and his Honor thinks that that should be done, we do not wish to put ourselves in the position of objecting to that or to any other element of 2852
a full and fair trial.

I find myself, and this is number 3, I take it, in agreement with Mr. Keenan, that because of the peculiar practice here which, as I understand it, does not require a fair opening on the part of Government's counsel, defendants in this case are not put in a fair position; whether Mr. McGohey, who has been very fair and courteous in the trial of this case, would wish, under whatever the rules of this jurisdiction may be, to make an opening is a matter for him and your Honor to decide. I think it would be very clarifying and conducive to greater fairness. I do not believe that either one of us is being treated with the utmost fairness not knowing even the theory of the Government's case as yet and probably will not know until after Mr. McGohey has addressed the jury. 2853

Number 4. I appreciate the statement made by Mr. Keenan, but I do believe that, inasmuch as it is admitted that we are now defending against the Government and are now also defending against the Bayers, co-defendants, we are in a position where your Honor, if you can, should give us the closing of the defense immediately preceding Mr. McGohey. I don't want to enter into any sharp contest, your Honor, about it. Things have to be tried; things

have to be left to the Judge; and whatever your Honor decides we shall abide by, not because we have to, but because we think we ought to.

The Court: As previously indicated, no agreement as to the order of summation was mentioned to the Court until a few minutes ago this morning. There has been no approval of any agreement by the Court, and the Court will not now undertake to construe an agreement made by counsel during the course of the trial and as to the result of which counsel are in disagreement. It therefore becomes incumbent upon the Court to pass upon the question of the order of summation.

2855 Now, Mr. Keenan, let me inquire of you, do I understand you are not, as now, making the motion that the taking of evidence be reopened and that you be permitted to put your clients, Elias and Samuel Bayer, on the witness stand irrespective of the order of summation?

Mr. Keenan: No, your Honor; I am stating that in the event we are required to present our argument for summation first, with no opportunity to answer either the Government or the counsel for the defendant Major Radovich, I am moving this Court to reopen the case so that the result of an unfortunate misunderstanding may be corrected, and that I may have the opportunity to put the defendants Bayer, or either of them, on the witness stand.

The Court: But I want to understand you clearly, and if I do so understand you, Mr. Keenan, you only make your
2856 motion to reopen the evidence in the event that you are required to make your summation first. Am I correct in that?

Mr. Keenan: That is the crux of the matter, your Honor, yes.

The Court: All right.

Mr. Keenan: But I don't want to get into any technical situation.

The Court: I don't desire to put you in any technical position, but I do wish to understand what your position is.

Mr. Keenan: My position is that under the circumstances now we are not certain of having the right to sum up after the defendant's counsel for Radovich, we are now moving the Court for permission to reopen this case for the purpose of introducing the testimony of those witnesses who we decided not to offer because of the agreement that was made between counsel that now seems to have been misunderstood.

The Court: And it follows, I take it, that if you should be accorded the privilege of making your summation for the defendants Bayer after the summation for the de- 2858
fendant Radovich, then you would not desire to reopen?

Mr. Keenan: That is right.

The Court: Now, Mr. McGohey, another suggestion was made, which I want to dispose of now, lest I forget it later, and that is—by General Ansell—that the Government make an opening summation in this case. What have you to say to that?

Mr. McGohey: Your Honor, under the rules of this Court which have been in force for many years, and under the practice in this Court and in this State, which I have followed for many years, that is never done, never has been done, and I decline, respectfully, to make any such opening statement.

Mr. Keenan: Could I ask your Honor if the rule of 2859
Court would be cited to me, than any more definite statement than the rules of this Court? I would like to have that rule by its proper designation.

Mr. McGohey: Well, I don't make the point that it is a written rule, Mr. Keenan, but certainly it is the established practice and has been throughout my time——

Mr. Keenan: I understood that there were instances where judges from other jurisdictions sitting in the Southern District of New York have not followed that practice.

Mr. McGohey: I won't dispute that.

The Court: That is enough on that. From previous experience in the District Court for the Southern District of New York I know that it is the established custom, whether it be a written rule of Court, that the opening statement of Government's counsel made to the jury at the beginning of the case is considered as his opening and he is not required or permitted ordinarily in either this Court or the State Courts to make a summation to the jury after the close of the evidence before the summation made by counsel for the defendant or defendants. I am not disposed and am not going to vary the custom which I am satisfied
2861 is universal in this District and in this State. I shall not require the Government to make an opening summation.

Now as to the order of summations of the defendants in this case, I recognize that counsel for the defendant Radovich and counsel for the defendants Bayer both desire to follow the other. I recognize also that it is some advantage to the counsel who speaks after the other counsel. I know of no rule of law or precedent to govern the matter, and I know of no circumstance which is determinative of the question. I think that one counsel or one set of counsel will have some advantage over the other by reason of the order of their summation. I know of no fairer way to determine the question than by lot, and I am going to determine it that way.

Call the clerk, will you, Mr. Wallace?

2862 (The clerk entered the chambers.)

The Court: Mr. Clark, will you go to your desk in the courtroom and take two identical sheets of paper and on one of them write "First summation" and on the other one write "Second summation," and fold them carefully so that the writing cannot be seen and bring them in to me.

The Clerk: All right, your Honor.

(The clerk left the room.)

Mr. Keenan: Could I say something off the record?

The Court: Yes.

(Discussion off the record.)

(The clerk returned to the room.)

The Court: All right. Now, gentlemen, have you any preference as to the draw?

Mr. Ansell: No.

The Court: All right. I am going to accord the privilege of the first draw to counsel for Samuel Bayer inasmuch as the Bayers appear first in the indictment.

Mr. Keenan: I am going to decline that, your Honor.

The Court: All right, sir, the Court will draw for you. The Court is now drawing for the defendants Bayer. It reads, "First summation." 2864

It will be the order of the Court that the defendants Bayer make the first summation.

Mr. Keenan: The Court will grant us, of course, an exception to that entire procedure.

The Court: Certainly. Now, what about your motion to reopen the evidence?

Mr. Keenan: Now I am making the motion to reopen on the grounds stated.

The Court: And I now understand that counsel for the defendant Radovich makes no objection to it, is that correct?

Mr. Ansell: I make no objection, but I thought it was conditional on the fact that if Mr. Keenan—did Mr. Keenan get the first—I am not going to object to the reopening of this case by anybody, your Honor. 2865

The Court: What has the Government to say?

Mr. McGohey: Your Honor, I neither oppose nor consent to it.

The Court: All right, sir. It will be the order of the Court that the taking of evidence is reopened, and that any person that desires to introduce further testimony may apply for permission to the Court.

Mr. McGohey: If the Government wishes to put any evidence in in rebuttal, your Honor, I take it that would be granted?

The Court: I certainly meant my statement to include the Government as well as all other counsel.

Mr. Keenan: We want to confer with my co-counsel.

The Court: We will sit right here in status quo then.

(Short recess.)

Mr. Ansell: If your Honor please, at Mr. Robb's suggestion and in order to avoid reopening this case and going into many matters all over again, we approached Mr. Keenan and asked him if given the closing argument for
2867 the defendants he would then insist on going ahead and putting on his client, which would possibly entail other witnesses, and he says he will agree to that. I agree to that before your Honor.

The Court: What have you to say, Mr. Keenan?

Mr. Keenan: I say, in view of the General's agreement that he will go forward first and that we may come afterwards, we are perfectly willing to go forward without opening up the case.

The Court: Very well. Let it be so ordered.

(The following proceedings were had in the courtroom in the presence of the jury:)

The Court: Ladies and gentlemen of the jury, as you recall, when we adjourned on Thursday afternoon the evi-
2868 dence in the case was complete. The next step in the case is the summation by counsel to you and the Court. In other words, counsel for all parties will address you and me presenting their theories of the case and the evidence and their views of it. I am going to, and I don't think with undue hardship on you, undertake to complete the summations today. There are four gentlemen who will address you. And some legal questions arose this morning which delayed the opening of the case. Nevertheless I think we have time for completion of the summations today.

I state to you that I apprehend that it is going to be a little later than we would ordinarily quit in the afternoon, but I bespeak for the gentlemen who will address you the same attention to all of them whether you are fresh and vigorous or growing a little tired. I don't think it will be unduly late, but it probably will be, and, if you wish, make any calls during the lunch hour that you will be a little late when we finish this afternoon, but not unduly so.

All right, gentlemen.

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2870

SUMMATION ON BEHALF OF DEFENDANT RADOVICH.

Mr. Robb: May it please the Court and you members of the jury, before starting my argument I wish to express to you the appreciation of myself and General Ansell and our client for the patient and the careful attention that you have given to this case during the long and rather arduous sessions of this trial.

I wish also to say that we are grateful indeed for the courtesy which has been shown to us by this Court, by the clerk and by the bailiffs and the court attendants. We have come here from some distance and we are perfect strangers, and that courtesy has meant much to us.

And let me say also that we are most grateful to Mr. McGohey and to Mr. Wallace for their unfailing courtesy 2871
to us. However much I may differ with them as to the merits of the case which they have put in here, let me say that they have and they deserve my esteem as lawyers and as gentlemen.

Now I said that I was grateful to you for your patient attention, and that is true, because your function here is a most important one. It is your function to decide the questions of fact in this case. You alone have that func-

tion. You alone have that responsibility, and you will, of course, decide those questions upon the evidence. For that reason, without further ado, I propose to analyze the evidence for you, and when I am through my task will be taken up in turn by General Ansell. I shan't attempt to cover it all; he will cover what I do not. In this connection let me say again that I speak only for Major Radovich. I do not speak for the defendants Bayer.

Now what is the evidence in this case so far as it may concern Major Radovich? In the first place, let us emphasize again what you have heard many times during this trial—the statements which were testified about and which
2873 it was testified the Bayers made to Colonel Snyder, and later on to Mr. Wallace; those statements are not to be considered against Major Radovich. That is a rule of law that will be followed, I know, because those statements were not made pursuant to any conspiracy and they were not made in the presence of Major Radovich. So we may lay those statements aside at the outset so far as the case against Major Radovich is concerned.

Now what is the evidence that you wish to consider in connection with Major Radovich? I think at the outset we are confronted with this statement which Agent Flynn testified was made to him by Major Radovich in March, 1945, in the offices of the F.B.I. in this building. Let us consider that Flynn-Radovich statement. Let us see whether or not it is praiseworthy. Let us see whether or not that
2874 statement as testified to by Flynn, is the kind of evidence in which you wish to place your trust to the extent that you will convict Major Radovich.

In the first place, that statement depends entirely upon the credibility of Agent Flynn. He is the only one who testified about it; although some other agent apparently witnessed the statement, he was not called. It depends entirely for whatever weight it may have upon the testimony of Flynn and Flynn alone.

Now let us see whether or not you are going to trust Flynn; what reasons there may be for not trusting him. I will give you some. Reason one: Do you recall Agent Flynn's testimony about the statements that were made to Mr. Wallace by the Bayers? Do you recall how Mr. Flynn inadvertently omitted fact after fact that was mentioned by the Bayers? Do you recall how Mr. Keenan had him on the stand all morning, bringing out these various things which he had inadvertently omitted? And do you recall that, almost without exception, those facts just happened to be things that were very favorable to the Bayers? Does that testimony indicate to you that Flynn is praiseworthy?

Reason number two: Do you recall when Mr. Flynn 2876
was asked by me to describe that crazy ward in which Major Radovich was confined? Mr. Flynn, this trained investigator, couldn't remember whether there were bars on the windows; he could not remember whether the gate had a lock and a grille on it; he could not remember anything about that. Do you believe that? And if you do not believe it, do you think Flynn is praiseworthy? If a witness will lie about one thing he will lie about something else.

Reason three: The statement that was produced here, this Flynn-Radovich statement, is in Flynn's handwriting. There were stenographers available. You recall the long parade of young ladies who came in and testified about the Bayer statement. Flynn did not have any stenographer. Let the District Attorney tell you why, when he gets up to 2877
answer me; make a note of that and see what he has to say. Why didn't Flynn call in a stenographer? You recall Mr. Flynn testified in response to a question by me that he did not put in anything about Major Radovich's record for example because he, Flynn, did not think that was material. Now the Court apparently thought it was material because you heard it read here. Mr. Flynn didn't put that in that statement. And I said to him: Oh, so you put in only those things that you thought were material? And he said

yes. Does Flynn's testimony about the Bayers indicate to you that he is a good and reliable judge of what is and is not material?

Then you remember Flynn's tricky warning. He testified here that he warned Major Radovich that that statement could be used against him in any criminal proceeding, and yet when he saw the statement, what does it say? "The statement may be used in any criminal proceeding." And Flynn just forgot to put in "against."

All those things are items and reasons which I suggest to you, and I suggest you consider them to determine whether or not this man Flynn is a reliable and dependable
2879 hook upon which to hang that statement and hang Radovich.

Now, of course, it may be that the District Attorney will say, we are not trying Agent Flynn here. Of course we are not. But whatever weight that Flynn-Radovich statement has depends upon Mr. Flynn's credibility. And so we are, in a very real sense, trying Mr. Flynn's credibility.

The Court: Let me interrupt you just a moment. I am sure your use of the word was a figure of speech and inadvertently made, but you used the expression, something about using a statement to hang something and hang Radovich. Of course you did not——

Mr. Robb: I used it as a figure of speech.

The Court: But I just do not want any impression made
2880 upon the jury even inadvertently that this is a capital offense.

Mr. Robb: No.

The Court: I know you did not intend that. But while I have interrupted you, let me go further to say that any reference to punishment or possible sentence in the course of summation is improper, and I am not charging you with doing it, Mr. Robb.

Mr. Robb: Oh, no, I had no intention of doing any such thing.

The Court: You were only using a figure of speech, but sometimes those things are misunderstood, and I just wanted to make that clear.

Mr. Robb: Yes, sir.

The Court: I am sorry I had to interrupt you.

Mr. Robb: But now I pass to the real reason, I say real, I mean the biggest reason, the most important reason why this Flynn-Radovich statement ought not to be regarded by you.

You recall that Mr. Flynn testified that before he wrote out this statement in his handwriting in his office in March, 2882
that he produced a statement that had been made or taken by him in September. Remember that. He produced that September statement and he showed it to Radovich and he had Major Radovich read it, and then Flynn read it. Flynn says that the second statement, the March statement, the one that you have been shown, that was just about the same as the September statement.

Now the District Attorney hasn't produced before you that September statement; he doesn't want any part of it. Let him tell you when he gets up to answer me why he has not produced that statement. I don't know what his explanation will be, but I will tell you what the truth of the matter is. The truth of the matter is that that September statement was extorted and coerced out of Major Radovich by a third-degree that was as cruel and as effective as 2883
any treatment with a blackjack and a rubber hose ever was. Now let us see what the situation was. Major Radovich gets back from overseas, he is on the Pacific Coast somewhere, where his home is; he gets orders to report to Mitchel Field, as far away from home as he can get and still stay in this country. He reports to Mitchel Field for duty. No suggestion about what is going to happen to him.

As soon as he gets there what happens? He is thrown in a crazy ward and put in a cell. He is stripped of his uniform. He is given a bathrobe, with no cord on it, and a pair of hospital pajamas. He is not allowed to use the telephone. He does not have counsel. He can't communicate with his wife or his family. He is watched, he is watched night and day. He is watched when he sleeps, he is watched when he goes to the bathroom. He has eyes staring at him. He is deprived of his knife and his fork and he is fed like a wild beast. And this goes on for days and days and weeks and weeks. Locked in that ward with crazy men and screaming drunks, locked there for weeks
2885 under those conditions, held incommunicado.

Let me ask you, if you had the choice of being beaten with a piece of rubber hose and going through weeks of that kind of confinement, which would you prefer? Which would break you down the more? A little beating in some back room of a police station in the old-fashioned orthodox way of giving the third degree, or this kind of subtle, cruel, ceaseless beating of the spirit that Radovich took in the crazy ward? You know which would be more effective. And it was more effective.

And after Radovich had been there for just about a month, Flynn shows up, and Radovich—of course he was broken, he would have said anything that Flynn wanted him to say; and Flynn takes this statement which the District Attorney does not dare produce here. And then in
2886 March Flynn shows this statement to Radovich and he has Radovich read it over.

Now Mr. McGohey may well say to you: Oh, well, in March the nut ward was all past. Of course that was terrible, but it was all over with. Don't you believe it. Have you ever seen a dog that has been beaten cruelly by his master. When that man raises his hand, that dog will cringe; the mere suggestion, the mere threat of force is enough. And so it is with a child who has been cruelly

used by its parents; the mere suggestion on the part of the cruel parent that that child is going to be beaten or mistreated is enough to make that child cry for mercy. It is not necessary for the parent actually to strike the child.

And so it was here. Flynn produced that September statement and showed it to Radovich, and it was just as plain as though he said it in words, "Well, Radovich, we have got the statement from you in the nut ward. Are you going to stick to it or would you like another dose of that treatment? We got you hooked. Are you going to go back on it?"

Now I know Mr. McGohey may say, "Well, Major Radovich was not charged"—but he was a human being, and 2888
human beings are much the same, whether they are five years of age or twenty-five; Flynn, that shrewd, smooth sleuth, he knew how to play on Radovich when he got him in his office in March, 1945; he knew how to use that statement he had taken from him in the crazy ward. And if you don't believe that statement was voluntary, if you think it was induced or coerced by the treatment he received in that nut ward, then you must disregard it, throw it out of your considerations entirely, because that is the law.

But now we pass on. Even if that Flynn-Radovich statement, with all the doubt that surrounds it, with all the array of coercion and third degree that surrounds it, even if that be considered, it still isn't enough because the law is there must be other evidence in the case besides the statement of 2889
a defendant, and the law is very wise in that respect because the law knows that statements sometimes are very, very unreliable. There must be other evidence to fortify this statement even if it is considered.

Now let us see what the other evidence is. In the first place, look it over and you will find it is almost entirely circumstantial. A great many things on their face can be either innoc nt, or, if they are twisted around a bit, they can be construed to indicate guilt perhaps. Those things

are used by Mr. McGohey as a basis for asking you to believe this boy guilty. Circumstantial evidence. In the second place, you will find that this other evidence in the case is full of doubts, full of substantial doubt, full of contradictions, and sometimes full of perjury.

Let us look at it. Take, for instance, the witness, Captain Pepper, who was introduced here by Mr. McGhoey in an attempt to fortify this Flynn-Radovich statement. You remember Captain Pepper. He started out with great assurance, and then I asked him if it was not true that he had been charged with violating the 95th and 96th Articles of War, in that he had lied. He said no, that was not true.
2891 Then I showed him a paper that showed that it was true. And he said, "Oh, yes, I had forgotten about it."

Now you know if that man had been convicted of violating those articles of war he could have been fired out of the Army, put in the penitentiary. Do you think he forgot it? Do you think he ever forgot he was charged with those violations? Or do you think he lied to you about it because he hoped he could deceive you? And if you do not believe he told the truth about that, can you trust him in any respect?

He testified, you recall, that Captain Radovich, then Captain Radovich, said to him, "It will be worth our while to transfer these boys." And then we asked him, "Well, Captain Pepper, when you testified against Captain Radovich at the court-martial last June, you didn't say that, did you?
2892 Didn't you say that Captain Radovich told you that it might be to your advantage, and there was a lot of rank interested in these boys?" And Captain Pepper said, "Well, yes, I did testify to that before the court-martial." "Well, Captain Pepper, which is it?" Well, he was not sure.

And then we asked him, "Well, Captain Pepper, you testified here before this jury that that conversation about it being to your advantage took place at Mitchel Field. Didn't you testify before the court-martial that that conversation

took place when Captain Radovich was in Washington and when he called you on the telephone?" And Pepper said, "Yes, I did testify that way, last June, before the court-martial, and now I am not sure when it took place."

Is that the kind of testimony that you ought to take, that you ought to credit, and that you ought to find will fortify this so-called Flynn-Radovich statement?

Now, take this witness, Colonel Jacobson. He testified in response to questions by Mr. McGohey. He testified that Captain Radovich came to see him when Colonel Jacobson was in the hospital, and Jacobson said, "How did you get mixed up in this thing?" And Radovich said, "Well, it's a crazy thing, I did it for my wife and baby." 2894
That is all he testified to in response to Mr. McGohey's questions. And then I asked him, "Well, Colonel Jacobson, did Captain Radovich say anything about getting any money from the Bayers?" and he said, "Oh, yes." He said he got some money from them. Now mind you, Mr. McGohey hadn't asked him about that. So I said, "Well, Colonel Jacobson, did you tell that to Mr. McGohey? Did you tell that to the F.B.I.? Did you tell that to Mr. Keenan?" "Oh, yes, I told them all about that."

Don't you know that if Colonel Jacobson had ever told Mr. McGohey that Major Radovich said anything about getting money from the Bayers, that Mr. McGohey, as careful and as skillful a lawyer as he is, would have asked Colonel Jacobson about that on the witness stand? And you heard Mr. Keenan and Mr. Levy say, "No, this man 2895
Jacobson did not tell us anything about it."

Well, now, we come to the matter of these uniforms which has been talked about here for days, I guess, and apparently Mr. McGohey relies upon that as evidence fortifying, corroborating, this Flynn-Radovich statement. Now let us see if it does. In the first place, Mr. McGohey says, well, the Bayers got the uniforms for these officers and then they got the records changed to show that the officers and not the Bayers had paid for the uniforms.

Now let us look at that so far as Major Radovich is concerned. The testimony here is uncontradicted. Major Radovich never got his uniform from the I. Buss Company. The thing didn't fit him. He never took it. And one of the Busch brothers testified, "Well, the thing was an odd size and se we had to peddle it out piecemeal." Well, now, why in the world should the Bayers change any records of the I. Buss Company in respect to Radovich's uniform when Major Radovich never took the uniform? He never got it. So what does that record prove in respect to Major Radovich?

Here is another matter about uniforms which I think is
2897 very significant. In this Flynn-Radovich statement Mr. Flynn has Major Radovich say that Elias Bayer took him, Radovich, to a uniform manufacturer named Levine and told Levine to make two uniforms for Radovich, and Levine made the uniforms and Elias Bayer gave Radovich the money to pay for them and Radovich did pay for them. Well, there is something which Mr. McGohey could have corroborated. Why didn't he bring in Levine and have Levine testify about that if that is what happened? If that statement is correct, why doesn't Mr. McGohey bring in Levine. He brought in three or four of these Busch boys —I lost track after about the third; he brought in three of them to testify about this uniform business, and to tell you all about the uniform Radovich never got. Why didn't he bring in Levine if this Flynn-Radovich statement is true
2898 and if it could be corroborated? Now don't let him tell you, well, we ought to have brought in Levine. It is his business to prove Major Radovich guilty; it is not our duty to prove him innocent. The burden is on Mr. McGohey.

Now let us take up for a moment, and I will try to pass over the various items of evidence as best I can, hoping that I can help you a little bit in passing on them—I don't know what Mr. McGohey's theory is going to be because he

has not, of course, made his argument, but I am trying as best I can to touch on these various items of evidence. Let us take up, for a moment, the various transfers about which I anticipate Mr. McGohey will talk quite a bit. Now, there is nothing unusual about those transfers on their face. Everybody knows that men in the Army are being transferred hither and you and here and there every day, for all sorts of reasons, and sometimes for no reason at all. Everybody knows that. I recall Miss Goertz, the lady who testified about the transfer into the Air Commando Unit and then out again; she said that was perfectly normal, that men were being transferred in and transferred out every day, there wasn't anything unusual about it. In other 2900
words, these transfers are another bit of substantial evidence which Mr. McGohey undoubtedly is going to rely upon. When I am speaking about substantial evidence, let me say that substantial evidence is not enough to convict unless that evidence is such that it will exclude every reasonable hypothesis consistent with the defendant's innocence, and unless it points only to the conclusion that he is guilty. If it is equally consistent with innocence and with guilt, it is not enough to justify a conviction.

Now coming back to these transfers. Take up first the transfer from the base out at Mitchel Feld into the First Fighter Command, which was the organization commanded at that time by Captain Radovich. That transfer was arranged by Colonel Jacobson and by Colonel Vidal. They 2901
both testified that that was true. At the time that transfer was arranged and at the time it took place, Major Radovich had never even heard of the man. There isn't any doubt about that. He didn't have anything to do with that transfer. But in his opening statement, Mr. McGohey, on page 5 of the record, told you that he was going to show that that transfer was arranged by Major Radovich. Now let me ask you and let me ask Mr. McGohey, why did Mr. McGohey make that statement to you, as careful a lawyer

as he is, as good a lawyer as he is, as carefully as he has prepared this case, did he make a mistake? Or did he make that statement because Jacobson had misinformed him, because Jacobson had tried to blame Radovich for something that he had nothing to do with, and then when Jacobson took the witness stand and had put his hand on the Bible and testified under oath, Jacobson lost his nerve? Which was it? Did Mr. McGohey make a mistake or had Jacobson lied to Mr. McGohey?

Now take another transfer. Mr. McGohey is going to say Radovich transferred these men into the Air Commandos and then transferred them out. Now, Colonel
2903 Boebel, whom you remember, a very fine looking young soldier, testified that he ordered Radovich to transfer those boys out. He told Radovich to transfer them out. How about that?

Now passing quickly to another item of evidence, and here is one that I know you are going to hear a great deal about from Mr. McGohey, this check for $500 which was apparently drawn to the order of Captain Jack Pepper. You remember good old Captain Pepper. Now, in the Flynn-Radovich statement, Flynn has Radovich saying that Radovich arranged with Pepper that Pepper would keep his eye on these transfers and see that nothing went wrong, and Radovich told Pepper that he would give Pepper $500, and after that, according to the statement, he sent Pepper a check for $500; and then Mr. McGohey pro-
2904 duced a bank from down in West Palm Beach, Florida, I guess it was, who identified a letter to the bank signed by Major Radovich asking the bank to turn over to the Government or, rather, the proceeds of a $500 check to Captain Jack K. Pepper. Now, I think that is the evidence on that particular item.

Let us see if that is evidence which is free from doubt and free from question. In the first place that letter which

the bank produced shows on its face it was written by Major Radovich while he was undergoing that hideous nightmare in the crazy ward, and why he wrote it, what induced or coerced him to write it, the District Attorney doesn't tell you and doesn't show you. Why didn't he? Why don't they tell you more about that? Are you going same infirmity and the same vices as that statement that was wrung from Radovich in that crazy ward. Why all this mystery about turning the money over to the Government? Why don't they tell you more about that? Are you going to trust this kind of evidence that is still full of mystery, so full of unanswered questions?

But all that, all those matters are minor; here is the real 2906
question I have to ask about that Pepper evidence. According to the District Attorney, according to this Flynn-Radovich statement, Radovich sent that check to Pepper pursuant to an agreement that Radovich would pay Pepper $500 and Pepper would watch out for these transfers. Now, he sent that check pursuant to an agreement. In other words, Pepper was a party to this conspiracy. Now, if that is true, and if this Flynn-Radovich statement is true, let me ask the District Attorney why wasn't Pepper indicted? Does the District Attorney believe the Flynn-Radovich statement against Radovich, but against nobody else?

If that check was sent to Pepper pursuant to an agreement, that was a conspiracy—the District Attorney and 2907
the Court will tell you a conspiracy is simply an agreement, that is all it is—why wasn't Pepper indicted? Now, either that check was sent to Pepper pursuant to an agreement having to do with the transfer of these boys or it was sent for some purpose unconnected with this case and about which Pepper does not care to tell you. Now, which was it? Which was it? If it was sent pursuant to an agreement why was not Pepper indicted? Don't let the District Attorney tell you, well, it is up to the Grand Jury to indict

people. The Grand Jury indicts the people the District Attorney presents for indictment. And we all know that. But the District Attorney never even tried to indict Pepper. Pepper was never arrested. Why not? If the Flynn-Radovich statement is the truth, why not? Let Mr. McGohey answer that when he gets up to answer me.

Now, I have about used up my allotted time. General Ansell will follow me and will discuss portions of the evidence upon which I have not touched. Let me say to you in closing that I think that when you go to your jury room and you begin to analyze this evidence calmly and dispassionately, as I know you will, you will find that the
2909 testimony and the evidence against Major Radovich, when you boil it all down, comes to this: one statement, supported only by the testimony of Flynn, sweated out of Radovich by the third degree, that one statement plus a flimsy tissue of circumstantial evidence, full of doubt, full of contradiction, full of perjury. I think you are going to find that this case is based too much on circumstantial evidence, that too much evidence that is worm-holed with doubts, contradictions and perjury. I think you are going to say that that kind of evidence is not enough to support a verdict against this gallant young officer, that will satisfy now and that will not rise to haunt us and plague us with doubt in years to come. I think you are going to say that the only verdict that will satisfy our consciences now and that will not trouble us with doubt and with regret in the future, the
2910 only verdict that would do that is the verdict of not guilty as to Major Radovich.

Mr. Ansell: If the Court please, and you ladies and gentlemen of this jury: I join in all the appreciation for the many courtesies shown us lawyers from a foreign jurisdiction. I think I could say briefly that I have never felt more like a West Point plebe than I do today, since those days. The time was, in a military way, when I was up there, and I happen to know that this distinguished jurist on this

bench was, not way up there, a distinguished soldier, and Mr. McGohey was not way up there and he was a good soldier, and Mr. Keenan. The pranks of life. And don't you know, I am afraid now, I really am, afraid of his Honor, afraid of Mr. McGohey, afraid of everybody, afraid to be here; and if it was not for the slogan that "where duty calls there is no room for fear" I probably would not be here.

You know, after all, I have enjoyed this stay in New York, with all of its hardships. It has been a kind of education of Mr. Pitt of myself. I was educated in New York, spent many years of my life further up the river. I was married there, my children were born there—buried 2912
there—and I am going that way, of course. And yet, I was always afraid of New York; I thought they were a strange kind of people, and they are not. They are courteous and kindly and help an old man across the street, and they are just like the people that I knew so well in an old Southern home.

Now, I can't trust my memory any more. I have notes, but it takes away from the effectiveness of a presentation. I had long ago resolved that never again on this earth would I appear in a military case, and I stood by it a long time. I stood by it until this case came along, and then, in the words of Alfred Noyes, a voice that I thought had long since left me, arose and called to me, and here I am.

I have come to help Radovich, not anybody else, Justice, 2913
justice. I have come here to try to see that he gets justice according to the law of this land. Justice, individual justice where the thing that this government was established for, and it is written in the preamble of our Constitution. It is a biblical truth that justice to the individual, to you, to me—not big guns, to the ordinary man—that, my friends, is the highest interest of man on this earth.

Now, you have been told by Mr. Robb and, of course, it is true that you are the judges of the fact and you are

the sole judges of the fact, and nobody can make you do other than as you think on your conscience and under your oath you ought to do; no judge, no attorney, and no anybody else. It is a great thing, a system that is common only to the English speaking governments of this world, that the Government of the United States when it is engaged in prosecuting one of its own citizens cannot punish that citizen until 12 ordinary people, plain simple people, say that the Government can punish that citizen by your vote of conviction. A glorious thing that I say to you no other country except an English speaking country on God's green earth has this day. I cherish it, I cherish it.

2915 I want to reason with you. If you do not agree with me your duty is perfectly clear. It is my duty to reason with you. I can't orate, I don't want to orate, and I couldn't if I were able to. I just want to reason with you plain human beings and I want nothing else, I don't want to captivate you, even if I could. I am not going to try it. To me—to me, it may not be to you, it will not be to Mr. McGohey, it may not be that way to anybody else on this earth—but to me the evidence against Major Radovich is just as light as thistledown. To me it does not even breed a suspicion. To me it is too flimsy to convict a dog on. To me it ought never to have been brought here. To me, it ought to be kicked into the trash pit.

I say there are only two bits of evidence here against Radovich, only two, and one of them has been dealt with
2916 very fully by Mr. Robb, that is, these F.B.I. statements, Flynn-Radovich statement, nut ward statement. One thing, I would supplement Mr. Robb's argument by saying: If the jury finds that the nut ward statement followed by this statement made by Flynn up here in this building was induced or coerced in the least, in the least extent, you have got to throw it aside. That I believe to be the law laid down by the Supreme Court of the United States.

The other statement is the testimony of Miss Ann Solomon. My own view of that testimony is that, even if it should be regarded as true, it tends to prove (a) the felony of an extortion which is not charged against Radovich here and you would have nothing to do with it. But, you know, when I left here Thursday, I think it was, Friday maybe, when I left here there was a great bitterness in my very soul against Ann Solomon. And that bitterness is no longer there. That bitterness fled the very moment I could get my wits together again, and that bitterness was superseded by pity. If it were not my duty to discuss Miss Ann Solomon, I would not do so. If I were not compelled to do so, I would not do so. I am reluctant to do so. My 2918
duty says to me at least I must, and I shall do so.

To me, Ann Solomon did not tell the truth. To me, Ann Solomon did not tell the truth because of her interest in Mr. Bayer. The story in itself bears unmistakable earmarks of untruth. Ladies and gentlemen of the jury, you are to judge the demeanor of a witness on the stand, and that is just as much a part of the evidence of what that witness says. The story of Miss Ann Solomon was a prepared story, beautifully rehearsed and learned by her. It was too glib, too smooth. Again I say it is hardly a practicable thing for her to have listened in on every telephone conversation that came into that office for Mr. Samuel Bayer. Ann Solomon testified that she listened in on the conversations between Mr. Sam Bayer's wife and himself and that
was apparently a part of her duty. My friends, I don't 2919
believe—I don't believe—that Mr. Bayer would put a wife, to whom he owed the utmost love and loyalty and devotion, in any such position as that. And I don't believe that he would have put a trusted employee who served him in any such position as that. I don't believe that Mr. Samuel Bayer would have added to the derogation of this poor girl to that extent. Any man who in my opinion would do that is a worse rotter than I have known.

Now, some more of Mr. Bayer. Why should Miss Solomon have resorted to the cheap and common eavesdropping at the door, spying on Radovich? Why should she have done it unless she herself was engaged and was induced to engage in another conspiracy? There were other conspiracies than the one charged here, swung all around this little one. Was she in a conspiracy to shield the Bayers and others, not Radovich, other Army officers? Let us be frank about it. Was she in a conspiracy to shield the Bayers and his conspiracy with high ranking officers at Mitchel Field and elsewhere hereabouts.

Described by the formal language in the bill of indict-
2921 ment, language that I hate, because I believe an indictment ought to come out and say, "This is it," and what it intends to prove—"To the Grand Jurors unknown." Many of them, apparently. Was there a conspiracy between the Bayers and Miss Ann Solomon and other officers of high rank, according to Pepper, at Mitchel Field? Was there a conspiracy to shield them and frame this young officer?

I have to ask you, why should Ann Solomon have listened in on a telephone conversation and then divulged that, when that makes her guilty of a felony under the laws of the United States? She can't do that. My friends, either Ann Solomon was possessed of her sentiments or she was told about the old philosophy of Omar, and I don't believe that: Take the cash, take the cash, let the credit go, nor heed this distant drum, the drum of conscience and what is coming
2922 hereafter.

I myself, so far as Miss Ann Solomon is concerned, I pray that the great God may relieve her from the situation in which she was placed, and at last redeem her soul.

Now, my friends this is the strangest case arising out of the military environment that I, out of a long experience, have ever known. I myself know, and I think it is a fair inference to be made in this court, and by this jury, that there was no proper and thoroughgoing investigation made

of any of this, either by the military or by the civil authority. It is my view, according to my view of the evidence, that they framed Walter Radovich to let others off. I do not say that those who ordered the investigation did that in the first instance. You know, my friends, this is like one of the old Greek tragedies, like any of the tragedies that have come up from the Greeks to this day—do you remember, or did you learn in school, or have you seen it, that in every Greek tragedy there was a great stage and on that stage was an innocent person, or at least one that was badly abused; and in the wings of the stage, on either side, there must have been some evil persons, and the shadows of those evil persons flickered across that stage on the 2924
innocent one. Such was the stage setting. It greatly impressed me as a boy. It is dramatic. But drama does not laugh except in so far as it is true to human life, and such is the drama of tragedy to this day.

Throughout this case, you go back to the first investigation and bring it up to date, and the evidence by the witnesses here, bring that up. And there are shadows that are flickering throughout this case, and sometimes the shadow becomes a witness sitting in this box who does not acquit himself well. Had there but been a thorough investigation we would have known where we are. Let us look at some of those shadows materialize, a few of them, as witnesses here.

Colonel Jacobson. Colonel Jacobson was the active agent 2925
in this case in these transfers, and Colonel Jacobson did not tell the truth on that witness stand.

Colonel Vidal, a graduate of West Point, like myself, God save the mark, he was here and he did not impress me as divulging all and telling the truth here.

There were others. Colonel Clark was mentioned. He was active in arranging these transfers, to transfer these boys to a safe spot and keep them from a danger spot.

Colonel Lundberg. Colonel Lipkin. Colonel Jones. Major, later Colonel, Saffron. Captain, or Major, Kogan. Just a few of them. That is all.

My friends, Radovich, youngest of them all, the last one to meet the Bayers, introduced to the Bayers by these particular gentlemen, apparently saw less of them than the other gentlemen did, apparently was less the recipient of their favors and entertainments than the others; after Radovich had gone, after Radovich had gone on a mission, described by the Chief of Staff of the United States Army as a suicide mission—men as a rule don't come back from those missions, and they are lucky if they do, 8,000 miles
2927 away in the jungles of Burma—why didn't these stay-at-homes direct the investigation at Radovich, safe, far away, probably never to return—he will never be heard of again? The War Department has started some sort of an investigation; we will point that investigation at Radovich. To me, that is just as plain as daylight in this case. And they appointed—they got the high ranking officers, and they appointed this—they may have got, and it appears to me they did get, to General Hunter over there; they may have got to Mr. McGohey and used Mr. McGohey as a cat's paw for the military establishment; they got the investigation, those investigations resulting in returning an indictment about a conspiracy upon the part of the three-named people and a lot of other people unknown to the Grand Jury. And, really, honest-to-God, nobody tried to find
2928 out who they were, and if they had found them out they would have found that those people—that conspiracy never included Walter V. Radovich, it would have included many an officer of the United States Army of far greater rank. I know something about Army investigations, and I say to you this investigation was a direct and framed up investigation for the purpose of getting Radovich and letting high ranking men go scot free. God spare me if that belief is not justified.

Time is flying. How much more have I?

The Court: You have twenty-five minutes.

Mr. Ansell: All of that, your Honor? Pardon me, all of that?

The Court: You have that at your disposal.

Mr. Ansell: Yes, I remember your Honor's caution—you don't have to take it all. I might.

When this investigation broke that was aimed at Radovich and finally pinned on him, way back yonder in the winter, the early winter of 1944, why was Radovich permitted to serve on in Burma after that? Why did he go out, mission after mission, day after day, missing never a day, up against the barbarous and most difficult enemy that 2930
the United States has ever had? Why risk his neck every minute of the time in Burma? Why not have brought him home then and given him an opportunity? Of course, they know and I know that that would not be done. They let this boy finish his last mission over there, the mission was done, it was completed, and the southeast monsoon was on and all the operations had to stop; and then he comes home to a redistribution center. Did anybody give him any advance notice that he was coming home to be court-martialed? He might have made some provision for counsel, friends, possibly borrowed a little money if that had been so.

No. To Mitchel Field. To Mitchel Field, this rich man's military paradise over here. He comes here. He lands 2931
there one minute, and the order of the Major General, over all, the most unusual thing ever known to me—not the Commanding Officer of the base, but General Hunter, his own handwriting on the order, not by his Chief of Staff, not by anybody—put Radovich in this cell for the violently insane. That is the reception that a heroic soldier got when he landed over here at Mitchel Field.

I have told you that, from my point of view, this evidence, such as it is, ought to be kicked out of this court by

you, by your verdict. If you disagree with me, in God's name disagree. But if after hearing what I have said and all that Mr. McGohey can say and all that Mr. Keenan can say, and all that anybody else under the sun can say, you still think that I am not only earnest in presenting these facts, but that I have presented them honestly, then let your verdict be for the acquittal of this soldier.

My friends, there has been admitted to you a statement awarding decorations of the highest order of merit to this man: the Air Cross, high up, the Distinguished Service Cross; and every soldier—your Honor knows, Mr. McGohey knows, we all know, and you know, what a Dis-
2933 tinguished Service Cross means, way up and above the duty that can be expected of the ordinary man. He got that not only once, he got it twice. And if you will look over the military reports published to the people of the United States, you will find out how few men get a second Distinguished Flying Cross. And third, the British Government is none too lavish when it comes to bestowing decorations and awards of this kind on even nations of her own allies. Not Britain. But Britain gave Radovich their Cross, of the highest British distinction; it said, "He saved a lot of us in this jungle."

And then the President of the United States—and this is not a usual thing, no matter what we may sit around and think when we see the President of the United States has awarded this unit citation to somebody—look at the num-
2934 bers of them, look at General Marshall's report—but the President of the United States paid a glowing tribute to this Commando or suicide group, the only suicide group known to me in our Army; there may be others, but the only ~~one~~ known to me in this war, except the English group that went over to Brest and did not return; you all heard that read. I was going to read it but I am not going to do it because I think it loses something by reading it. I think they are things that have to be studied. And if

you know how it is done, the officers sit up in the War Department and study every word of those things. Regrettably, to my way of thinking, they are not flamboyant enough, they are couched in too restrained military language; but to a man who has served in the Army he knows they mean much.

Going down on the train the other day, I had not been able to read General Marshall's report covering the last two years, concluding this war—a most interesting document—and I didn't know that he would deal with such a small operation as the Burma-Phil Cochran Commando unit group, somewhere between five and seven hundred men—I didn't know that—and yet he did. And this report, 2936
though addressed to the Secretary, under the statute, by the statute of the United States it has to be sent to the Congress of the United States, the Congress of the United States has ordered its publication to the people of the United States, that you, we the people of the United States, we are the government of the United States, might be informed of what our soldiers did in gaining, achieving the most magnificent victory that any nation of this world ever has won, a war not only on two flanks—something that every soldier dreads—but a war against us all over the world. We did not perhaps appreciate it; but General Marshall says: We can never appreciate how close our Japanese enemy and our German enemy were together; we will never appreciate, and we are learning only now how close it was that China came to be knocked out of the 2937
war. He says that the Cochran Commando group, in this terrible land of the Burma jungles, the thermometer running to 128 degrees, so that one frequently could not hold the stick and had to wear gloves, where your eyes would be burned by the ordinary glasses, to—we will never know how close we were to world domination by our enemies if they had been able to join hands. We could not attack the Japanese in Burma from the south; the Japanese held

it. We could not attack Burma in the east; the Japanese held it. We could not attack through China because the Japanese held the entire coast line and also the road over the Himalayas or the Hump. We had to go around back into India, to which Japan was headed and actually got there, in part, and go around there and come up, and take this Commando group and let them fly over into this Japanese held jungle of Burma and destroy their installations.

And General Marshall says that this great successful war by our enemies reached its crest right then and there and broke, not by the Commando group alone, of course
2939 not; but they were the point of spearhead that dulled the edge of the Jap invasion and set them back, and they never got any farther westward than that.

Well, my friends, I guess I am about over. I had something else here that I thought was important, evidently was not, and in any event I can't find it. My time is short and I have, of course, to conclude.

This indictment charges Radovich with betraying his trust to the United States, defrauding the United States by not rendering the best, honest faithful service that he can render. These medals and citations, character references, are all in point and must be considered. Radovich: As long as I live I shall have admiration for a brave man; he fought my battle; he fought my sons' battles. He did—let us be truthful about it; I would have had to be ordered
2940 to do what he did. I take my hat off to him. Character. A poor boy, in California. A Major at 23 years of age, and because of his expertness in aircraft, and he would have been a Major before that and he was so young that the War Department would not make him such, not that he was not qualified; he goes there and he does these things which I would have done only by orders. I know that. It takes a certain type of man, a fearless man and a man who loves this land just as well as I or he would not be fool enough to do it. He goes there and he does it.

You will have to ask yourselves I think, on your very soul, as to whether a man who performs such service as that was at the same time disloyal to his duty as an officer of the United States. I pray God that, if you honestly think, you will say no, he did not do it.

I thank you all, and I think your Honor.

The Court: Ladies and gentlemen and counsel, let us take a short, ten-minute, recess at this time.

(Short recess.)

Mr. McGohey: If your 'Honor please, I hadn't interrupted before. I notice that the stenographer has been taking down the summations, and I just wanted to ask that 2942
he be directed to continue to take down all the summations.

The Court: All right. Take down everything.

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SUMMATIONS FOR DEFENDANTS BAYER.

Mr. Keenan: May it please the Court, Mr. McGohey, General Ansell, ladies and gentlemen of the jury, at this time in the proceeding we approach the very serious and important function of having a jury pass upon the evidence in this case. I think I need not say to you that there is nothing more important in the civilization that we have fought for and won out with than maintaining the form of 2943
government that we have in our own country. It has cost a great deal to do it; the world was almost smashed in the enterprise, but it is worthwhile. It would be very silly to fight a battle all over the world and to lose the cornerstone of what we are fighting for at home. And there is nothing that I know of that this whole battle of the world was fought over more than the preservation of the proper rights of liberty of individuals.

Now that is not license, that is not the right to commit crime, unpunished; but it does mean that before a man is taken from his family and his walk of life and disciplined severely, punished for a crime, that there are certain procedures that have grown up, as the learned and distinguished general has told you, in the English-speaking world, with certain safeguards, that if we lose those we might just as well quit and let the Atom Bomb finish us right away. And that is, that a jury of twelve people, entirely removed from passion and entirely removed from silly, soft pity—that is fair on both sides—and entirely removed from atmosphere, air, but by solid facts in ac-
2945 cordance with the law and obeying it as his Honor states it, will see whether or not when they get through that they can honestly, before their own consciences and Gods, say: We have decided this on these facts, let the chips fall where they may, and we have no doubt whatsoever of our finding.

Now why do I speak of that? It is a very usual thing to have lawyers be mighty sure that they do not offend juries. You will forgive me if during the course of this trial I have had my attention riveted upon the record and upon the facts of this case and I have lost a little time not ogling you people and trying to curry favor with you or perhaps seeing that your throats don't get parched with a glass of water now and then—that is the job of other people, and it is our job to stick by our knitting and do an honest day's work.

2946 We have spoken of Jimmy Durante. He said over the radio the other night about this subject matter of politeness that he had a horse that was so polite that when he came to a fence it stopped and insisted that he go over it first.

Now the late Oliver Wendell Holmes was not talking about this rule because he died, oh, I think back some ten years ago, but he was a very great character, and all of the lawyers, his Honor I am sure will agree with me in say-

ing that he was one of our great jurists; he said this, in an article in Readers Digest, September, 1945, where they say, "Would a lawyer pick you as a juror?" I am going to quote what he said: "No lawyer, no matter what his experience, can possibly conceive how little the jury understands the case."

Now, Mr. Justice Holmes did not say that about you and I am not saying that about you to offend you in any way, but I am telling you that that is true of almost every juror that ever came into a court room. Why? Because the lawyers in the case who make it their business to spend their lives in trial court, his Honor who graces the bench spends his life, since he was appointed by the late President Roosevelt, every day in chambers or in his court room 2948
with one type of case or another, and we all understand a good deal about these things.

It so happens that this is the second criminal trial that I have participated in as a lawyer for the defense in my life, but I don't purport to be ignorant about the procedure or ask pity on that account or sympathy. I don't say that in any conceited way, but I have sat and been around the other side of the trial table, and you learn something about the procedure on both sides that way. But I say that we are accustomed to these things and we are very apt to take for granted that the jury will know many things that we know by rote, just like if we gentlemen tried to go into your businesses or into your homes, kitchens or drawings rooms—there is a lot that we would learn, and 2949
that many don't know, of the difficulty of keeping house. So, therefore, I am going to spend a few moments in analyzing the charge in this case.

Now if I can make head or tail out of this complaint, because that is really what the indictment is—it is like a neighbor coming alongside or bringing you down to a police station, "Lock this man up." "What for?" "Because he has done something." And they tell what he has done—

that, I want to say, is not evidence as it is stated; it is proven by the documents offered or by the statements from the witness stand. I have struggled with great care and attention to try to find out just what this indictment charges my clients with and I have had a great deal of trouble finding it out. And I have had the honor, as the evidence shows, of heading the Criminal Division of the United States for three years, and being in other superior positions in the Department of Justice, as First Assistant, and three years more having to do with the same thing, where we have been in this building many times; but yet I don't understand clearly what this indictment charges, and I say
2951 that if I don't, and I am honest in that statement to you, then I have a right to expect that the twelve members of the jury, who come in for a few weeks, maybe never again in your life, perhaps never before—we don't know; I imagine the United States Attorney would know something about that, but we are perfect strangers when we come in here, we don't know anything about it, excepting your name and what your business is—that is all we know—and we don't know how long you have been here, deliberating in any other case, we don't care; we are here to take the jury as representatives of our own community, feeling in our own hearts that that juror is going to be honest with his own peers and with his own judgment. And you are not here, ladies and gentlemen—this is not a beauty contest or a popularity contest—to find out whether you like
2952 the United States Attorney better, or you happen not to like me particularly, or you think a great deal of General Ansell. This is serious business. It gets way beyond that. This is a fierce relentless prosecution of a type I have never known in my professional existence in or out of the Government; just what is behind it I am not able to understand.

But I say that if you are to just take them for granted and say if these people were not guilty they would not be

here, or the United States Attorney is nice, this Judge is a nice man, he wouldn't let this thing go through if there were something wrong, then I want to tell you you are ripping our entire system of criminal jurisdiction to pieces. You might just as well scrap democracy and all we fought for. And, don't you forget it, after this jury does pass upon this situation, or any other, you may not hear it from the United States Attorney while we are arguing the case, but afterwards, then he will tell any other judge, "Oh, the defendant had every opportunity in the world, all twelve jurors had to agree and they had to agree that they did not have any reasonable doubt in their mind at all." And then the jury becomes absolutely independent of him and of 2954
the judge and everyone else. And that is the way it should be, all the way, to both sides, and that is all we ask is fairness in your deliberations.

Now coming back for a moment, what was it George Cohan used to say: The 17th of August the old fellow sat back on the chair and he says, "What's all the shooting for? What's this thing about?" To me, ladies and gentlemen of the jury, if I understand it, doing away with double talk, it is a very simple situation. I remember a very distinguished character in our country about a year ago over the radio saying to another distinguished prosecutor, "Oh, yes, I am four years older than I was four years ago but I am too old to try to learn how to talk out of both sides of my mouth at once."

I would like to know what is the claim of the Govern- 2955
ment in this case. As I understand it, it is a claim that the Bayers, Samuel and Elias, and Radovich got together in an agreement to defraud the United States Government by doing—what? By paying Radovich money, $7,000—they mention the amount—and by uniforms or starlight roofs, or whatever, buying the freedom of those two boys from doing their honest job in the Army. Now is that a fair summation of what you understand, if there is any sense to this charge?

Let there be no doubt about this, ladies and gentlemen: Bribery is as old as human nature. Everybody in the world knows what bribery is. Why, when our little children come into the world the first thing we do is bribe them so they won't cry; and when they get old enough we try giving them a little candy. It is bribery, it is innocent bribery but that is what it is. But when it comes to a point that a public officer or a man holding responsibities and trust for the Government, in any capacity, takes a sum of money for doing something wrong from another man, that is plain, simply, unadulterated bribery. You bet your life it is. And everybody in this court room knows it. And
2957 it will never be denied that that is what it is. And yet throughout this trial we hear the statement made: This is no charge of bribery and it is not any charge of conspiracy to bribe. What is all this double talk about? And the language that is used in the indictment, "defrauding the United States Government"—I am going to read the words that I have taken out—"and with divers other persons whose names to the Grand Jury are unknown," and still unknown to this jury, too, "to defraud the United States of its right to the conscientious, faithful, disinterested and the unbiased services and judgment of an officer of the Army, free from corruption, partiality and improper influence, bias, dishonesty, and more particularly of its right to the conscientious, faithful, disinterested and biased services and judgment of the defendant Walter Radovich as an
2958 officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

Well, if you claim that Samuel Bayer and his brother of their own volition, free from intimidation, did pay sums of money to Walter Radovich to keep their sons from going overseas, in the name of common sense why don't you say so and let it go at that? That is enough. That carries sufficient consequences. I am not permitted to discuss the matter of punishment. But it is sufficient to take it seri-

ously in a court room. Why don't they say that, ladies and gentlemen? What is all the double talk about?

The evidence in this case shows indictments, indictments, indictments, indictments, and then dismissed, and then another indictment. What is it all about? Why have we been three weeks in this court room, almost every hour of which was taken up by the United States Attorney bringing in evidence? Why? If that is the situation as it is claimed, why, it all could be described in a very few minutes. It all could be disposed of in a day's time, and we haven't unduly delayed matters in this court.

I ask you if at the very beginning you won't ask yourselves the question, what is behind this situation? Why 2960
didn't the Government come right out and say there has been bribery in this case and we are going to charge him with that and bring in the evidence, whatever it is? Because I want to tell you that there isn't any great difficulty about finding what the facts were.

Now I want to tell you that, as far as General Ansell is concerned, I have generated in this court room a very deep and tender affection for him. I am capable of that. And that is the real feeling I have towards him. And for Major Radovich, he has been a great hero in this war, and as far as ripping his character to pieces or trying to assassinate him in that fashion, you are not going to hear it from me.

Now I have my two clients sitting here before me. And
as Abraham Lincoln said in his speech with Douglas back 2961
before the Civil War——

I beg your pardon, your Honor. The war between the States.

He said, "Oh, you can get all of your favors from Mr. Douglas with his magnanimity and his great position in the United States and he undoubtedly will be the next President"—he was not—and he said, "Nobody can ever look at my lean face and see any cabbages sprouting from it."

I can't show any medals on Sam Bayer and Elias Bayer, I am sorry; I couldn't even tell you about a citation that I may have possessed myself in the last war. I have to stick to the facts in this case. And there are no citations and medals for Sam Bayer. But I want to tell you something else, ladies and gentlemen of the jury, that although a prosecution has the right to be vigorous, faithful to its Government, it hasn't any right, as the Supreme Court of the United States says in the Burton case, Mr. Justice Sullivan speaking, "to strike foul blows." And I am going to tell you of a foul blow that was struck right here before your eyes in the language of this indictment.

2963 May I have the indictment in this case, Mr. Clerk? I had better take the original.

"That theretofore, to wit, beginning on the 1st day of September, 1942, and continuing thereafter up into and including the date of the filing of this indictment"—July 15, 1945—"at the Southern District of New York within the jurisdiction of this Court Samuel Bayer, alias Samuel Bayarsky, Elias Bayer, alias Elias Bayarsky——"

What is that done for? You heard the witnesses from the stand talk about the character of Samuel Bayer. They would not give him license to bribe anybody if he were a good man all of his life up to that time. But I say to this jury, if there is anything proved beyond peradventure of doubt—and, ladies and gentlemen of the jury, is it too much to ask you to apply the Golden Rule in your own deliberations, to ask that you treat others the way you would like to be treated or your own would like to be treated? How do you like the idea, after hearing this man's banker and his lawyer and his neighbor and his rabbi come before you and tell you of a reputation for fair dealing and honesty and good citizenship that he had earned in a lifetime in this country, without a single whisper of a word from the distinguished United States Attorney? Oh, he would get them out of the way without a question, so you can forget

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all about it; never a word. "Any question?" "No." "This man—oh, let him go." "Who is this?" "Oh, he is just another character witness."

Now let me tell you ladies and gentlemen of the jury that it is the character witness that you would like to get if somebody falsely accuses you of some kind of an offense. And you say: Here, I have earned this reputation all my life of being a decent, honest person and now I am accused of fraud. I would like to have you talk to my neighbors and see what kind of individual I am.

And they would have you believe that this man, whom you heard, these excellent statements from some of the outstanding people of our community, who certainly would 2966
have no occasion to commit perjury on the witness stand, who says that he met his bills—the president of his synagogue—he happens to be a member of the Jewish race and he took care of his charities and he took care of his obligations and church; that doesn't give him any license to steal and cheat or to defraud, but it still establishes his character. And this organization, which I have had the honor to head at one time in my capacity at Washington, the Federal Bureau of Investigation came under my jurisdiction, and I took great pleasure and pride in the fine institution it is, brought out by a man for whom I have the utmost respect and regard and whom I regard in his work, it is part of the work of the Federal Bureau of Investigation to look up a man's character. When I was appointed in 1933 by the
President of the United States, from Cleveland, Ohio, they 2967
went and they combed my neighborhood from one end to the other to find out what kind of a man they thought I was. Mr. McGohey was chosen as the United States Attorney, or assistant, as he was first, under Judge McNally, they looked up his character with a fine tooth comb because they know how to do it, that is one of their chief functions, and when, last but not least, his Honor, a very able jurist who presides over the trial here, was considered by the Presi-

dent for appointment, they looked him up, too, very carefully. So they know how to do it.

And do you think with all of this investigation that went on with this case that they didn't know the full reputation of Samuel Bayer, when they could send all the way over to Tokyo to bring back Captain Kogan to tell about the lollipops and the Raggedy Ann dolls that his children got? Do you think that they didn't know that Samuel Bayer, at least before he ran into this situation, was an honored, honest and stable member of his community? Is there any doubt about that? Does the Government claim to the contrary?

But they tossed in the stink bomb, like the racketeer, 2969 that is what it was. And it said, "Ah"—some cruel mind did that, I don't know who it was—"alias Samuel Bayarsky, and we will tell the jury in a sly way that he comes from a foreign country and they may—start to apply a little more poison in there, too, in one way or another."

May I ask, in the name of God's good justice why in this indictment they apply the same aliases to these men? Alias means a crook, a slicker that you can't find. He is John Brown here, he is John Smith here, he is Ned O'Brien here; you can't put your finger on him. Is that the fair description of Samuel Bayer or Elias Bayer? And I say if it wasn't a deliberate attempt to prejudice the jury, to squeeze every bit of venom they could into this fierce and relentless prosecution, then let them tell you why they used the term "alias" and let them tell you, if they dare, 2970 that it doesn't have the connotation of a dishonest person who hides his identity in his own community, and then you pass upon that fact yourself.

Let us be logical, ladies and gentlemen of the jury, even though the Government called him a slicker and said his reputation was bad and he was alien, he went under false names, that wouldn't give him the license to commit a crime. I am not so claiming. You know, in this Federal jurisdiction of New York we have here, I know of no place

else like it in this respect: I have to give my entire argument, I never get a chance to answer the District Attorney at all; when I am all through then the United States Attorney says anything that he thinks he wants to, and with the same atmosphere of fairness I have to sit quiet in my chair without ever having an opportunity. You people know what a debate is, you know how many people would willingly go into that kind of a debate, when I am the man standing by the breech, standing facing the onslaught that is trying to take this man away from his position of responsibility that he has earned—well, ladies and gentlemen of the jury, I could talk a long time about that. I think you know what I am talking about. I think we had 2972
a right to fairness in the trial of a case. I think I have a right to come to you twelve strangers, or thirteen—I hope it is a lucky number for us this time—I have a right to come to you and say, wherever I come from, whoever I am, please don't misunderstand me; I am allowed to mention the fact that I did hold the position, it came out in this courtroom, but that doesn't give my client the right to do anything wrong or doesn't give me—if I had any reputation for honesty or probity, or for striking down racketeering, I don't want that in any way to be considered any license; indeed, I know you haven't held it against me that he had to go to Washington to get somebody, he was in so much trouble. That is not true.

I heard this man's story. And, there are two things that 2973
happened in my life, ladies and gentlemen: One was I lost my mother in 1918 when I was overseas in the Army, and I lost my son, who was just coming into manhood, and I have never completely got over either one of those two things. That is the reason I am in this courtroom today, and I am going to advert very briefly to it, only for a moment, but I don't want you to think that any reference that I am making to my experience means that I am setting myself up to be any superior erudite character. I am full

of faults, and I am doing the best I know how to say what I think about a man's life which is being erroneously attacked for reasons that I will go into.

Now I told you at the beginning that I believed we should keep away from atmosphere, and I intend now to go right into the meat of the coconut. I don't know yet who the United States Attorney claims, what officers he claims, were bribed—well, forgive me—were affected or disinterested or biased or partisan services. You know what that charge makes me think of. It makes me think of picking up a newspaper or hearing a neighbor talk, "Say, what's the matter? My neighbor John Brown is in a little trouble."

2975 "Goodness, no. What is it?" You pick up the newspaper and, "What is the trouble? What has he done? John Brown, I thought he was a decent fellow. What is it?"

"Well, wait a minute, don't be so impatient. I can't make this out so quickly."

"Well, read it out loud." "Well, what is it?"

"Well, said John Brown—what—was indicated; he did violently, wrongfully, illegally and wickedly take his right hand and his thumb in his first index finger and press it with great force and violence against the trigger for such a sufficient period of time that the amount of oxygen and nitrogen failed to penetrate, so that he became blue in the face and poisoned, and was deposited after a sufficient period of time under 12—6 feet of terra firma."

"Wait a minute. Are you joking about the seriousness
2976 of this crime? That is murder, that is homicide."

Why don't they call it that? That is the way I feel about this indictment. I don't know yet whom they are talking about that we are supposed to have affected, so I will leave out the word "bribe" from this time on because the Government isn't charging that, or conspiracy to bribe. That is the subject matter of other affairs. I will just use the general term, wrongfully affect the judgment, for the moment.

That is as near as I can group the words without going through 10 or 15 giant terms, as we used to call it when we were children, to find out what they are talking about.

What do they say? What officers do they say we attempted to wrongfully influence? Now, ladies and gentlemen of the jury, if they are coming around with some kind of proposition in their definition of "defrauding the United States Government", that you defrauded the United States Government out of the honest and faithful functions and services of any employees of the United States you had better watch out when you are talking to the elevator girl coming up, because if you get her to spend 30 seconds of her time looking away from her job you are defrauding 2978
the Government out of her honest services and you are liable to get her in a lot of trouble, too. That is the type of charge, ladies and gentlemen, that is brought here. They use the word "fraud" with nothing to hook it up. Any kind of way, and possibly anybody, anytime, anywhere. Indeed, it sounds like "Of Thee I Sing", one of the old comic operas, where they have the judge dressed up in the court.

Now this whole case, ladies and gentlemen of the jury, is based upon an alleged—an alleged—a claimed, agreement. I have been groping around in this courtroom from the beginning to try to find out who made the agreement, what were the terms of the agreement, when was it started, the conversation with whom? I have read some cases on 2979
conspiracy, every lawyer has in the courtroom, and conspiracy can be called the grand holiday of the prosecutor; you throw in the kitchen sink and everything you can in a conspiracy. But it must have an agreement. Remember that, ladies and gentlemen. You can't get away from that. You can be led around through a lot of labyrinths and up in the air and befogged, but when you get all through, when you are in your juryroom, won't you ask one another

this question: "All right, folks, what is the agreement? Who entered into it? When? Where, and how?"

Now it is true it does not need to be in writing, neither typewritten nor handwritten, nor witnessed or signed and sealed. It is not like an agreement for the lease of your house or employment. We admit that. But I don't know how people can reach an agreement without talking about it unless they use the deaf and dumb language. They could do it then. Get it somewhere else. Or you can do part of it I guess by talking about it and you can write shorthand and say I will do that; that would be by signs or something.

2981 But the mere fact that you don't have to put an agreement in writing, and the mere fact that it does not all have to be made at one particular second or time, and the mere fact that it may be difficult sometimes to prove, does not do away with the necessity of proving that there was an agreement. And you are entitled, ladies and gentlemen, to come to your decision—that is the first thing I would suggest; it is not for us to tell you what to do; I suggest, when you go into the juryroom you get together and say, "All right, what is the agreement?" And you must be convinced. That is our American system. That is where you are apt to be misled with the generalities and the atmosphere and there is some little remark I am going to advert to in a minute. You must decide that there is an agreement that all twelve of you can agree was the agreement

2982 made, no more and no less than just what you find that you can agree on, because you must agree among yourselves what the agreement was and who joined it and when, or else if you have any reasonable doubt on that one point then the Court and the law says that is the end of your deliberations and you come back and say, "I have a doubt about the agreement," and "a reasonable doubt", not a fanciful one, but the same kind of doubt that you apply dealing with your children, whether the episode just hap-

pened, when he was a little boy, or a grown boy, or if you are being told the truth or if you are in the land of reality —is it true? Would you be satisfied to have the same test applied towards you in your business life about what are facts, or is there a doubt? Because, then, if you have a doubt about it then the law gratefully says, and it is a very good reason we have it—I wish I had the time to tell you about experiences I have had in prosecuting celebrated cases, where there have been defendants, and where the jury came back and said, "Not guilty", and I thanked God a year later when I walked into court with the real culprit. I haven't the time. We have to confine ourselves to the time allotted to this case. 2984

But first of all, let us have an agreement. Now another thing, even though it does not have to be in writing, even though it does not have to be made at one time, it has to be made and it has to be of a nature that you can understand it and agree was made. And then I am going back again to the jury—I hope I don't make you mad because I don't want to, but if you don't understand it don't let it go by you; say "Not through me", the iron duke or the iron duchess, as it may be; you will have to come at the soul of it, so it is your case to prove it in a way that there is no doubt; "If it is bribery that you are charging then you prove bribery, say it is bribery, then we will go along with you; but if we don't understand what this agreement is we are going to say so."

And when I ask you members of the jury not to give up your independence on that, don't you let anybody sway you in your own judgment, your own conscience; if you have an honest doubt don't be afraid to say, "I don't know, I don't understand it." 2985

When I first started to practice law out in Cleveland there was an old judge that I got to love a lot and he gave me a book called the "Statue of John Orourigan", he poked a little fun at me I think; and it told the story of an Irish-

man who came to this country, made a couple of hundred thousand, and he thought a lot of his own people, he laughed with them and at them, that they were a pretty wonderful people, pretty optimistic and a pretty proud race. So when he got back he went on a tour of Ireland. And he picked up his guide to take him to where the statue was of John Orourigan, and he said to this Irish guide, when he came, "Of course you know John Orourigan, the great patriot that fought in the 1700s against the English."

"Oh yes, indeed I do. Well do I know him. And he was smart and great. Oh yes."

So they went from one town to another. And the end
2987 of the book comes—weeks I think—and he never found the statue of John Orourigan because there wasn't any such gentleman at all.

They have a great tendency in life, a good many people, of saying, "Yes, I understand," because they are a little bit timid to exhibit what they think is their own lack of knowledge. If you ladies and gentlemen of the jury don't understand it, say "I am sorry, but I don't understand this." We lawyers have to do it, everybody has to do it. Now I am not asking you to generate some flimsy doubt in your mind, but if you really don't understand—and it can't be some nebulous idea, it must be an agreement and it must be, ladies and gentlemen of the jury, of a type that is referred to, the precise conspiracy that is alleged in this indictment. All right.

2988 Now I think it is fair to discuss two or three points in order. The first thing is, if I break down the Government's case, if I understand it at all, the first thing they are talking about is a conspiracy of meeting with officers. I am not going to spend very much time on this. Well, what do you say? Do you think it was by chance that Eli Bayer met Colonel Vidal and Lieutenant Roeser in the Copacabana? Do you think it was a chance meeting or do you think that Eli Bayer was lurking around there and had

some kind of talk with Sam beforehand: "Let's see, let's go around to the night clubs, see if you can find some officers." If it is not that, I don't know how there could be any conspiracy or agreement by them, because that is where the Government starts its case—the first witness, they called Colonel Vidal about the transfer. Do you think it was an accidental meeting?

The next point is this: When it comes to the question of uniforms, I would say this so-called misconduct on the part of the Bayers, stripped of all this loose verbiage, or what I call double talk, and I honestly mean that, the first thing is that they said, "You tried to influence officers with uniforms." Now we have heard the statements from the 2990
witnesses on the stand about the uniforms. And for a long time I had a distinguished representative of the FBI, Mr. Flynn—I don't see him around here this morning, it is about the first time he has not been here in this proceeding; but you heard him on the witness stand talk about the statement of Samuel Bayer, that he interpreted for you before the going got so tough that they had to abandon that one and finally put in the written statement, the typewritten statement, because we had it and we forced it—but they didn't ask to put it in this case—and this man was kept on the witness stand—and I want to ask you at this time, anytime you want to read or have read any of this testimony, you in your juryroom, you have the right to come right in this courtroom and ask the Judge and say, 2991
"Here, we would like this, sir; we would like to have such and such testimony read." And I am inviting you to do it because we want to go by the evidence in this case and get away from the atmosphere. All right.

Is there anything clear, ladies and gentlemen, that this was an accidental meeting between Vidal and Roeser and Elias Bayer and not the result of any agreement at all? Is that a fair statement? Resolve that question in your

own minds. A little after lunch I am going to read to you one or two bits of evidence on that if there is any doubt, I think it is a waste of time because I think everybody on this jury knows that it was an accidental meeting, that there is nothing in any way to show that it was different than a thousand other meetings that took place that night.

And the second point is about the uniforms. When the distinguished—the young FBI man got on the witness stand he said the talk came up about uniforms, but when we got down to the meat of the coconut and broke it down and asked the question from one witness after another, every witness in the case said the officers asked Elias
2993 Bayer if he knew any tailors, because he was in the thread business. So it was no agreement, ladies and gentlemen of the jury. You wouldn't like that done to you or yours under those circumstances, finding that that was any kind of agreement that Sam Bayer was in, or any plan to go out and lasso some of these officers and lurking around night clubs. The uniform comes second. There comes along the second point. And every witness in this case—let us hear Mr. McGohey in his closing—I won't have a chance to answer him, but I challenge him now to point out to this jury from this evidence—I am going to read you plenty of it, I have them all marked—one bit of evidence in the case from the mouth of one witness saying that the request for the uniforms did not come from the officers to these men.

2994 In the name of common sense, you will find that the officers came to Bayer, down there, to their office, nobody solicited them, nobody went out and said, "Won't you come into my parlor said the spider to the flies?" Nothing like that. Every bit of evidence in this case shows—what? I can recount it without the record for the moment. First of all, Colonel Vidal said that he was talking to Lieutenant Roeser—and, by the way, before you go to lunch, folks,

where is this man Roeser? Why didn't the Government bring him in this case, the man that knows the whole story? It was Roeser that was met the first night. It was Roeser that brought Vidal down to the office. It was Roeser that brought Jacobson down to the office. It was Roeser that brought Englehart down to the office to get the uniforms. It was Roeser that brought himself down to get a uniform. It was Roeser that brought Radovich down there, the Hamlet of this whole plot. But nary a sight of Roeser from the Government. Roeser, that was the boss of these boys. Roeser, that knew whether they did an honest day's job. Roeser, that knew whether they were put aside to make way for a little girl that came down. No Roeser. He is 2996
not brought in this case. And if they could send all the way over to Tokyo to learn about the Raggedy Ann dolls and the lollipops from Captain Kogan, with all the FBI and all its prosecutors and all the Army, certainly they could lug in that poor little lieutenant and bring him up and tell you what the story was in this case. And why didn't they bring him in? They kept him out of here, the same way that they correctly kept out the statement of September 15, 1944, from that poor semi-temporary demented major that they had in an insane asylum because he had a breakdown and he had that breakdown long before he came to Mitchel Field at all. And, as I am going to argue to you, and I think I can show it with a fair degree of confidence, Major Radovich, Captain Radovich, 2997
never should have been in this flying business at all, that he had had accidents, he had been dropped down from the sky, his colleagues had been killed, he had been bruised and bumped, injured, and the man wasn't himself. He describes this incident—these little truths pop out from the witness stand—he describes the incident to Colonel Jacobson: He said, "I was crazy, and I tried to do something for my wife and child." And the Government said he was crazy. I hope they do. I would like to know what possible

excuse they could have for this man under guard. And I tell you, I am a bit ashamed, an old friend of the FBI, when I go back over Gerald Flynn's statement on this witness stand and about meeting this man; you would think he was in an ordinary hospital, nothing wrong at all, he didn't see anything. He was like that little animal, "See nothing, hear nothing, know nothing." Here was a man, plain as could be, in a cell with demented people, psychopathic case, temporarily crazy, and the FBI man here on this witness stand indicating to you that there was nothing abnormal about him whatsoever.

Now I will have a little more to say about that later,
2999 as it is time for lunch, and, in the amenities of life, maybe this will be a time I can do a kindly thing for this jury, to adjourn my talk so that you will get something to eat, and we will have a little more to say about this when you come back.

Your Honor, would you mind that?

The Court: No.

Ladies and gentlemen, we will take a recess now until 2.15. Please be back promptly.

(Recess to 2.15 P. M.)

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AFTERNOON SESSION.

3000 Mr. Keenan: Just before the adjournment I was discussing with you, turning now to the testimony in the case which has been written up, and I assume that you will be very much interested in hearing what the testimony from the witness shows as to any attempt made by the two defendants Bayer to influence any one officer in an improper way.

Now of course we will come to the subject matter of Radovich because the only way we have of getting out

that will be through statements; but I assume that it is a fair proposition, now that we are in this wondering stage, to find whom the Government claims and what the names of the officers were. I don't think that anybody will say it is fair that at this time, when the Government is all through with its case, I think we can say: All right, who are the officers that you referred to as having been influenced in any way by the Bayers in this so-called agreement or conspiracy? I think that is fair. I don't see how anything could be fairer because, remember, this is now the Government's case; it starts to put the witnesses on the stand and it offers you proof which is supposed to convince you beyond a reasonable doubt of who they were, 3002
and you can't guess it, you can't infer it. We are entitled to some solid testimony on this point. All right. Let us, as the late Governor said, look at the record and call the roll.

The first witness that was called was Colonel Travis. Well, he just came here to testify about records, nobody ever saw him, nobody ever claims that they saw him; he knew no one, he just came, and he gave you the documentary proof about the transfer. He didn't know the Bayers, he didn't know anyone. So I will not bother looking at his testimony.

Now the first witness is Colonel Vidal. Now the Government offers Colonel Vidal, a gentleman, a West Point graduate, as its witness to prove its case that some effort 3003
was made to influence him in some improper way; so we have a right to go right to his testimony, and that is right what I am going to do now.

That occurs, Mr. McGohey, in Volume 2, pages 14 and 17.

And here it is. Here is Volume 2, the testimony, and here is 14, and I am going to read it to you. And, believe me, I don't like to give up all this time, I could spend all

day probably going over it and various matters that I am coming to, but I know of nothing that I could do, with greater respect to this jury and from a more solid defense, than to read you the testimony, although it does take the time. Now here it is, the transcript by the official stenographer and written, and I am going to read it:

"Q. You met Elias Bayer, as far as you know, purely by accident that night at the Copacabana? A. Yes, sir.

"Q. You don't think he was, as far as you know, lurking around on the outside to see you come in there? A. No, sir. * * *

3005 "Q. You came down to his office after that? A. Yes, sir.

"Q. When you say the Plymouth Thread Company, that is located on 20th Street, I believe 21st Street * * *? A. Yes, sir.

"Q. And that is where you met Samuel Bayer? A. Yes, sir.

"Q. You never saw him before that time? A. No, sir.

"Q. Nor had you talked to him before that time? A. No, sir.

"Q. And you didn't know that he had a boy in the service at that time? A. No, sir.

"Q. And nothing was said at your first meeting at 3006 least about his having any boy in the service that you recall? A. No, sir. * * *

"Q. At that time did they ask you to do anything for him?"

Well, they—I am going to read back.

"Q. Well, a conversation took place in their office first? A. Yes, sir.

"Q. At that time did they ask you to do anything for them? A. No, sir.

"Q. At all? A. No, sir.

"Q. Had your uniform at that time? A. No, sir.

"Q. Was there any statement made to you, 'If we get you a uniform you don't have to pay for it'? A. No, sir.

"Q. Or 'If we get you a uniform we will expect you to do something for it'? A. No, sir.

"Q. Or anything implied from the circumstances, as far as you know? A. No, sir."

Now, ladies and gentlemen of the jury, this is the Government witness that the Government puts on the stand and vouches for his honesty and truthfulness and fairness, and these are questions and answers that are being asked of such a witness. This is the stuff. This is not atmosphere. This is the testimony. And does it prove an attempt up to now to in any manner corrupt Colonel Vidal? 3008

"Q. Coming now to the time when you met them outside the gate, I believe you fix that as some time late in July or early in August— • • •

"Q. And you have, I think, made it clear if I recall correctly, that no civilians could get inside that camp • • • ? A. That is true. • • •

"Q. So when Samuel Bayer came out the first time he, as I recall, asked you if you would look up to see whether or not a transfer had taken place? A. Yes, sir. 3009

"Q. He didn't ask you to make the transfer, did he? A. No, sir.

"Q. Or to have anything to do with it, did he, except to look up and see whether it had taken place or not? A. I will qualify that.

"Q. All right, please qualify it. Let us have the whole story."

That is my question.

"A. Yes, sir. After he learned that the orders hadn't been issued, he wondered whether or not I could do anything to expedite them."

Now, what was wrong with that? That was done every day in the week in every camp, with every officer almost throughout the United States, if a man was going to be transferred, asked that the orders be expedited. That in and of itself.

"Q. Yes, that is right. But first he asked you to
3011 look up and see whether or not the orders had been issued? A. Yes, sir.

"Q. And you did? A. Yes, sir."

Now, who would know best, the Government witness? This is the Government witness, it is not ours.

"Q. Was there anything wrong about that, Colonel? A. No, sir.

"Q. Have you done matters like that, or do officers do that from time to time in the Army? A. Yes, sir.

"Q. That has happened with a great big Army and with a lot of people in it; that is not infrequent, is it? A. No, sir.

"Q. Nothing wrong about it that you know of? A.
3012 No, sir."

Now, where is the testimony about anything wrong being done with Colonel Vidal in asking him to do that? Is this testimony or is this vaporizing? Will you get the same kind of testimony read to you by Mr. McGohey when he addresses you, when my lips are closed in this case? I am going to the record. But that is not all.

"Q. You didn't so consider it then? A. No, sir.

"Q. And don't so consider it now? A. No, sir."

All right.

"Q. And you found that the transfer hadn't taken place; right? A. That is true.

"Q. And then you told that to Samuel Bayer? A. Yes, sir.

"Q. Then he asked you if you could expedite it? A. Yes, sir.

"Q. Did he offer to give you anything if you did that? A. No, sir."

That is the fact, ladies and gentlemen of this jury; that is not vaporizing. That is testimony. I have a right to look you all in the eye and I have a right to look the United 3014
States Attorney in the eye and saying, when we come to the point, "What is wrong with the statement? Let us have the testimony. Not vaporizing, not atmosphere." That is not all. I had never seen Colonel Vidal in my life, and he said that from the witness stand. I had no idea what the man was going to say, other than my honest belief in my clients telling the truth. Then I asked him:

"Q. Did he attempt to corrupt you at that time? A. No, sir.

"Q. In any manner? A. No, sir."

And then I asked this question, and I ask you ladies and gentlemen to consider the import of it, when you know how
a lawyer walks into a witness called by the Government 3015
and puts his arms open like that, to be smacked right in the jaw if he is not on solid ground, and here is the question:

"Q. And, by the way, we are here in a court of justice, you are representing the United States Army as a witness called by the Government—did Samuel Bayer, as far as you could determine, attempt to cor-

rupt you in any manner at any time that you have known him up to today?"

And the answer is: "No, sir."

Now, ladies and gentlemen of the jury, in all fairness, when you have to decide an issue and the Court tells you that it must come from the evidence in this case and must convince you beyond a reasonable doubt, how can you say that anything wrong was asked or any attempt made to corrupt Colonel Vidal? Wouldn't he have known it? I have asked him the question, and the reply is: Why, certainly, if there had been anything wrong about it I would
3017 have known it. I could not have been fairer in conducting the examination. That is not atmosphere, that is testimony. But I must march on. They tell us that time marches on.

Let us see who is the next one. The next one is Saffron. That is in Volume III, Mr. McGohey, on page 62.

It took a little of the midnight oil to get this together, ladies and gentlemen, but this is the stuff, this is the meat of the coconut. Here are questions to Major Saffron:

"Q. What I am trying to bring out is, when Samuel Bayer went to meet you on that day in July, as you best fix the time, of 1943, you spoke about some officer coming in? A. Yes, sir.

"Q. That was Lieutenant Fabbricatore? A. Right.

3018 "Q. What you learned about the Bayer matter out at Mitchel Field you learned that evening? A. Exactly.

"Q. You knew nothing about it before? A. Right.

"Q. And of course had nothing to do with it later, did you? A. Right.

"Q. So whatever rumors you heard, or whatever you heard, you acquired that information that evening? A. Right."

I am bringing out that whatever talk he had with him in reference to these boys about shifting their position after they enlisted, that is the sole meaning they have to be there, and if you have any doubt about it, please ask that you have the record shown to you and read it in every detail. You have that right, and everybody has to accord it to you.

Now the question. This is now the second witness, and we can't do more than to go to the Government's witness that they bring in, and again I say I never saw Saffron before, I hadn't the slightest idea what the man would say, except what my client told me as the truth. Here is the question: 3020

> "Q. Did Samuel Bayer ask you to do anything improper that you know of in that evening?"

Now wouldn't you think that would be a question that the United States Attorney would want to have answered, with his own witness that he put on the witness stand and vouching for? The record shows:

> "Mr. McGohey: I object to that—'improper'—your Honor.
>
> "The Court: I am going to overrule the objection.
>
> "The Witness: Will you repeat that question?
>
> "Q. Yes"——

Now, this is my question; it doesn't act as though I thought 3021
I had some criminals that I was representing in this courtroom, with Government witnesses that were sponsored by the Government, if ever a man opened himself up wide to any truth coming back from the witness stand, listen to this question:

> "Q. Yes, I will repeat it, and I am making it very broad purposely. Did Samuel Bayer ask you that evening yourself, to do anything improper?"

Isn't that something that you are interested in finding out? Isn't that what this case is about?

"A. No, sir.

"Q. Did you ever have any conversations with Elias Bayer at all about this matter in any manner, shape or fashion?"

And the answer is:

"No, sir."

Let me interrupt for a moment. Elias Bayer needs a lawyer. I have got so much to do to talk about Samuel
3023 Bayer, I don't know where Elias Bayer comes in this case at all. But I have to go on with my limited time. But here is the first time Elias comes up: "in any manner, shape or fashion? A. No, sir.

"Q. Did you know him well, or— A. Very casually, I met him once.

"Q. Whatever there was to this business"—get this question, ladies and gentlemen of the jury; there is the second witness; don't worry, I am coming to the money part of it and to the talk with Radovich later, that will not be left out at all; but I am coming down to the questions and answers as quickly as I can to give you the heart and soul of this evidence and not atmosphere in this case.

3024 "Q. Whatever there was to this business about the boy, you never had any relation—no questions were asked or no conversations with Elias Bayer at all? A. That is correct.

"Q. Do you know where Martin Bayer, the son of Samuel Bayer, was at that time, in July, whether he was at Mitchel Field or Westover Field? A. I do not.

"Q. Specifically, do you know whether he had been transferred at the time? A. I believe that he was not at Mitchel Field."

So, we find out that at the time of the conversation with Saffron the boy had already been transferred to Westover Field. If there is any doubt about that, ask for the record. It comes out; I haven't the time to go into all of it.

Now, I then asked a stupid question, ladies and gentlemen, and I remember one of the jury smiled at me, at the stupidity of my question. I asked him:

> "Q. So that if he were transferred from Mitchel Field to Westover or Bradley Field, he would be at either one of those two places, as you best recall, at the time of this conversation in July?"

And the witness very properly answered. "I do not understand the question." I got a little confused myself by my question. 3026

Now I am going again to Saffron: and this is marked at page 64 of the same volume:

> "Q. You weren't offered any money of any kind, were you? A. No, sir.
>
> "Q. Well, I know that you indignantly reject the suggestion, but I am saying no one offered it to you? A. That is correct.
>
> "Q. Or anything else of value? A. No, sir."

Where is the attempt made to corrupt Saffron? Here is his own statement. Is this atmosphere? Is this vaporizing? Or am I coming to the Government's own case, with the Government's own witnesses, strangers to me, that the Government offers, asks you to believe their testimony when they offer a man on the witness stand. Well, so much for Saffron. He says no one ever offered him anything of value. And I am reading you the record and quoting it to our friend so that he won't forget to talk to you about that when he comes to his summation. 3027

Now the next one is Captain Pepper, to whom reference has been made by my predecessor. And you will find

Pepper's talk on that point in Volume III, pages 107 to 111:

"Q. I believe you have said that you never met any of the Bayers, either Samuel or Elias Bayer? A. That is right."

That ought to be sufficient; I wouldn't have to go to Pepper any more; how could an attempt be made by Samuel or Elias Bayer to corrupt him, excepting through Radovich? That could be done, of course. But as far as any direct contact with him, he didn't even know the man. So I don't think I ought to be required to spend very much time on
3029 that.

"Q. I didn't ask you whether they were at Mitchel; I just asked you if you ever saw them before, or recognized them? A. They were pointed out to me yesterday for the first time."

And then another question that is not too bright, it may be a little stupid; I said:

"And I assume you never had any conversation with them? A. No, sir.

"Q. Or any communications of any kind? A. No, sir."

Then he was asked this question, while we are on that sub-
3030 ject matter:

"Q. Were you asked to transfer them any place on Mitchel Field by Major Radovich? A. No, sir."

Page 109:

"Q. If you will just answer my questions * * *. Did you have anything to do with the transfer of personnel as classification officer? A. No, sir.

"Q. It wasn't part of your duty at all? A. No, sir."

Now, the conversation between himself and Major Radovich is referred to, and it appears that he was asked in a friendly way to give his opinion, no part of his duty whatsoever, but whatever it was, there isn't one thing in the world that shows that Samuel Bayer in any manner asked Radovich to do anything about going to Pepper or anyone else, because we will come to this in a minute, ladies and gentlemen of the jury—I will have to interrupt my parade of the witnesses for a minute to state this to you:

If I hadn't brought the Bayers in and told them to tell the exact truth to Mr. McGohey, there would be no evidence binding upon either one of them before you today of the payment of a five-cent piece of money, because the Court 3032
will tell you that you cannot consider in any way this statement of Radovich against either one of the two Bayers. That is the law. I am going to be perfectly frank with you and say that I don't think there was a juror that ever lived that could conscientiously hear a statement like that and put it aside and throw it away and say, "I never heard that when I come to consider the case against Samuel and Elias Bayer." But that is the law. That is what I think is the unfair thing about this type of trial, of lumping all this together, instead of charging the defendants with bribery, if that is what the Government's case is, and keeping the other statements out. It is hard for me to keep the thing straight in my mind.

But to go back. Since Pepper didn't know the Bayers, 3033
they never went to him, they never had any conversation with him. So far as their actions themselves are concerned, they couldn't attempt to corrupt Captain Pepper. And as far as Captain Pepper is concerned, he has already on that witness stand said that he was not the subject matter of a court-martial, the charges never were preferred against him, and right in the next page Mr. Robb asked him the question and showed him the charges—it is the

most bald falsehood that has been told in this entire proceeding, and bland as a—I won't say bland as a Chinaman, but bland as can be. He just said: Oh, I didn't know that I was court-martialed for the most serious charge that can be leveled against a man. And he said—I am continuing to try to get it in the record of the particular time—he didn't say, "I just remembered it," but he said, "I didn't remember that I made that statement," because it was in the statement he made to Colonel Snyder that I am going to refer to in a minute. He said, "I forgot when I gave that statement," because it was a statement he had to admit, he was cross-examined. I don't see how anybody
3035 can believe a single word that that man said about anything.

However, as far as Pepper is concerned, we never saw him, never talked with him, and I don't see how that can be considered as any direct attempt to corrupt Pepper.

Now the next one they brought was a young lady, the little Goertz girl. Well, she never saw the Bayers at all. She was the clerk that took the part of the Colonel. She was a rather nice looking little girl that wielded a terrific amount of power in the Army, could take boys out, put them in the Commando Units, back and forth, and the Colonel was sort of a little stooge over in the corner. She never met the Bayers. I am not taking the time to read through the testimony, but everybody on this jury will remember that she never saw either one of them before she
3036 came into court. So, whatever responsibility is there would be through Radovich. We will come to that in a minute. We have no direct contact with her.

Ladies and gentlemen, if you will indulge me for a minute, it is something like a teacher trying to prove a negative and it is not a very easy thing to do, but I have to knock down everything that the Government put up; and I don't have to show you that my people are not guilty; the Government must prove they are guilty, and beyond a reasonable doubt. But I am so confident of the innocence of my

people that I am trying in a logical way, as though I were arguing in this case before twelve judges instead of twelve members of a jury; I am sure of my case, that we need no atmosphere, or trying to please someone, but let us see whether proof of a real crime has been offered in a legitimate way in this courtroom.

The next witness is Boebel. Boebel is in volume 3, page 169. It gets a little tiresome, ladies and gentlemen, but please bear with me, because I am on pretty important matter. Now here is Boebel:

"Did there come a time when those men were transferred out of your organization? A. Yes, sir.

"Q. Do you know where they were transferred to? 3038
A. They were transferred to Headquarters Squadron, First Fighter Command.

"Q. Prior to their transfer, did you have a conversation with anybody with respect to that transfer? A. Yes, sir, I did.

"Q. With whom? A. Colonel Jacobson.

"Q. Now after those two men, private Bayer and private Usdan, were transferred out of your organization at Mitchel Field, did you ever see them again? A. Yes, sir, I did.

"Q. And where? A. At Seymour Johnson Field, Goldsboro, North Carolina."

That is all the evidence of the Government with respect 3039
to Boebel. Certainly none of the Bayers—he never saw either one of them, had no contact with them at all; he didn't even know the boys, to be sure, because the record will show, and I think he was mistaken at that; I believe that young Melvin Usdan—I don't think he ever saw them down there then, I think he was mistaken about it. But, in any event, here is the testimony, on page 169; that covers the whole story as far as Boebel is concerned. And he said

that they were transferred out of there as a result of a conversation with Colonel Jacobson. All right. We don't hear anything more now from him until the boys get down to Goldsboro:

> "A. I told Major Radovich two men had arrived, reported to our organization, whose names were Bayer and Usdan. I asked them—I asked Major Radovich why they were assigned to our organization. He told me that he did it as a favor to Colonel Jacobson."

Colonel Jacobson denies that entirely, he is a Government witness, and the Government is sponsor for Colonel
3041 Jacobson. I don't know which one Mr. McGohey will follow. I don't know whether he will tell you that Colonel Jacobson was telling the truth when he said that he had nothing whatsoever to do with this transfer from Westover Field down to the Commandos, because Boebel says that Radovich said that he did it as a favor for Jacobson. Now Mr. McGohey can pick his poison on that; he can either believe his witness that he offered or he can believe the admission of—or he can believe Boebel or Radovich; but whatever it is, the record shows clearly no conversations, no relation between Samuel Bayer or Elias Bayer with Colonel Boebel whatsoever. Anything else is atmosphere. This is evidence.

Now the next witness in the case is Captain Kogan. That
3042 is the gentleman, ladies and gentlemen of the jury, that came into this courtroom some time last May, where the United States Attorney said that we would be holding up the war on Japan if we did not go right on with this case, because he was such an important witness. He came over here, and what he talked about we will go to right now. I have called it the Raggedy Ann blocks or dolls—I haven't got the details on it; you will have to excuse me but I will do the best I can.

That is found, Mr. McGohey, at page 186, volume 3, and 202. Here it is:

"Q. Do you recall anything else that was said at that time? A. Well, Mr. Bayer said he would like to get Martin into the Air Corps just as his older boy Robert did at the time.

"Q. Did he say anything else that you recall? A. I believe he asked me if he could get to Mitchel Field; would it be possible he would be enlisted for the Air Corps at Mitchel Field.

"Q. Did he say anything else that you can recall? A. No, nothing else I can remember at that time."

3044

Now, surely, when the Government had respect enough for Captain Kogan to send all the way—to fly him back from Tokyo so he could testify in this case, and that is what they said, they ought to have respect enough to pay attention to what he says when he says that is all that was said at the time. They sponsored him. That is his testimony. This, ladies and gentlemen, is not atmosphere; this is the meat and substance of the case; it is the testimony. It is what we go by in a lawsuit.

Now I would like to go right into it. It will take a few moments. You will have to be patient with me because it is the heart and soul of this case. I ask you, I solicit your indulgence if it gets a little trying and tiresome. It is not poetry, but it is certainly the meat and substance, and we are not here to convict people I hope on atmosphere. Page 187:

3045

"A. Mr. Bayer called me and asked me if I knew that all enlistments in the Army were going to be closed on the 15th of December. I told him I did. He asked me what happened to most of the boys who were inducted, what branch of the service they went into. I told him that in my opinion the bulk of inductions

went to the infantry. He said, 'Well, if Martin could get enlisted now, do you think it is still possible for him to get in the Air Corps?' I told him I thought they could. That was about the gist of the conversation at that time."

Now if that is a conspiracy, they had better go and take me in custody right along with them because it is exactly what I did with my son. I asked him to get into the Air Corps. I didn't want him in the infantry because I felt he would have a much better chance for promotion, a much better chance to get on. I don't want to leave anybody
3047 with any false impressions. My son's eyes were no better than most. He was not a flyer but he was in the Air Corps; and he tried to get into that branch of the service. We make no apologies for it. And what is wrong with that?

"Q. Do you recall whether there was anything else said about the infantry by Samuel Bayer at that time? A. Well, Mr. Bayer made it very clear that he wanted his boy in the Air Corps rather than the infantry; he preferred him to be in the Air Corps rather than the infantry.

"Q. What part of the Air Corps, do you recall? A. Well, as ground crew, I think.

"Q. Did Martin Bayer then enlist in the Army? A. Yes, he did.

3048 And since when did it become a crime to want your boy in the ground crew of the Air Corps if he can't fly? I don't suppose, ladies and gentlemen, that there is one out of 2500 men who try to fly that ever get by these rigorous tests. Is there something to be ashamed of in wanting him in the ground crew? There is no family shame in that. People get into other branches of the service where they think they can do the most good. There is nothing wrong

in being in the Quartermaster's Corps. We don't all have to fly planes. We are not all men that have fine coordinated muscles and faculties that would make us flyers. I don't know whether Mr. McGohey would be able to fly, or his associate. Perhaps he would, perhaps he would not. I don't know about myself. I can tell you this: I was in the artillery in the last war and I never made any effort to become a flyer, and I don't make any apologies for it at all. Since when did that become a crime?

All right, we go on. Kogan. Let us see the worst that there is about it, so we don't cover anything up.

> "A. Mr. Bayer told me that his brother had met quite a few officers from the First Fighter Command, that 3050
> they had become very friendly, and one officer, Colonel Jacobson, had recommended that the boys be transferred to work for him over in the Fighter Command, that it was a good assignment and looked good for a while."

Anything wrong about that?

> "A. * * * I told Mr. Bayer that I thought it was a very poor deal to get into, get involved in, and I did not think anybody could promise anybody where they could be, because they never knew the next day where they would be themselves."

Is there anything wrong about that, going around talking, people talking, having discussions about what branch of 3051
the service they could go in, or where they will be, more likely? If you want to, let us reach it right now, on the question about overseas, if we are going to be free from hypocrisy. I remember, and I would not have a misunderstanding upon this, that when they took away our last great President I lost a dear friend, and I want to tell you that nothing ever said could cause me to say one single word

that would ever in any way reflect upon his memory, but I mean now if he were sitting right here, he would ask me to go ahead and say it. But you recall a lot of people felt that our young boys should not go overseas at the beginning, and there were debates that you could read in the New York Times about whether boys 19 or 20 years of age should be taken or whether they should have a year's training. I know many of you ladies and gentlemen have read the papers on this subject and you know what I am talking about. There even were Acts of Congress, passed in the Senate, in which they—one branch voted that they could not send them abroad until they were 21; that was in
3053 the public press. And is there anyhing wrong about that, ladies and gentlemen?

Let us get to the meat of the coconut right now, another aspect of this case. It is a lot different to take a boy, one out of three, who has had some weakness, rickets, early in his life; who has a spot on his lung, who expectorates blood, and who has shown a tendency not to be one of the rugged boys; that happens in every family. And then, as I mentioned to you, with Samuel Bayer in this room right now, I described him as an old clucking hen—that is what he had in mind, ladies and gentlemen, in this case; he had in mind not to keep his boy out of service. He had three lovely boys, as lovely as you ever laid an eye on. And the unfairness of the prosecution, ladies and gentlemen of the jury, they didn't even want to let you
3054 get a look at his picture of this boy Martin who is now admittedly over in the jungles of Burma, and we couldn't have him come in to testify in this case; and in his place I asked that a poor humble photograph be shown to this jury and Mr. McGahey says, "I object. It is immaterial. I don't want this picture shown to the jury." That is the purport of his objection.

Since when did it become wrong—the loveliest instinct that is in a parent's heart. And remember, ladies and gen-

tlemen, if he was solicitous for the welfare of his boy, and it must be within limits, he is displaying one of the loveliest things that the human character has. It wasn't for somebody else's boy. There is the lady sitting at the side of Ann Solomon in this case, his wife, sitting on the end. It was her boy. The only wife he has ever had. And it was his own flesh and blood. And he was following the instinct that is put in the heart of all of us, even those who are not civilized, even the animal. It is a human instinct to look out for your own young. And if any man in this world should ever have—not pity; if he is guilty I am not cringing, I am not asking for special consideration, but if a jury should have what the Good Book calls an understanding heart, it ought to be in the man's conduct 3056
toward one of the three boys.

We didn't make the story up, it was not manufactured. Sam Bayer didn't give his boy double pneumonia for the five days before they shipped him over to Burma. That little Melvin Usdan never told a lie to you when he told the story. It wasn't framed or manufactured. It was like a message sent from God Almighty. I hadn't the slightest idea that the boy was about; by accident I found out. I said, "In the name of common sense, where is the boy?" I tried to postpone this trial until I could get Martin here, but they didn't see fit to do it. Let us have Melvin, ladies and gentlemen, bring him in, put him on the witness stand and let us hear his story. And you heard him. A little boy. And the three men got their heads together, and I 3057
remember, after he testified, toward the end of the day, the learned Judge said to Mr. McGohey, "Will your cross-examination be brief or will you have much to say?" He said, "Oh, there will be several questions certainly of this witness." And how they did put their heads together, these skillful lawyers and the F.B.I. men and the Army and Navy, to try to break down the truth. But you may just as well break down the mountains and the eternal hills as

God Almighty's truth when it comes from the mouth of a young boy. Was there guile in this boy's manner?

Listen, ladies and gentlemen of the jury, they did a good job on these boys that were footballs and kicked around long ago, these officers and men whoever they were. I would never have known it. How would we know? I had never seen Melvin Usdan. His uncle saw him for an hour or two. There seems to be quite a grave complaint about that, about the young boy's wife seeing him and the boy's widowed mother. And she had dinner with him at the Grand Central Station. We have explained how he got the time, going overseas. Is that wrong, for an hour and
3059 a half or two hours, with his mother and with his uncle, who acted as a human father would? But there was the boy on the witness stand. There, he came. We used to have an old lawyer out in Ohio, in the Sandusky region, and he used to call a witness like that God's witness.

Well, it seemed like it to me. We did not have very much in this case, with all these officers swarming around like locusts, and just what could we do, to ask them questions and took the answers, or whatever they would say. I on one side and Mr. McGohey on the other; and Mr. Wallace on the other; and taking down Ann Solomon, from ten o'clock in the morning until four o'clock in the afternoon, and the little Busch man was down there ten and a half hours, interrogated.

What is all the shooting about? What is behind it?
3060 Fraud of the Government? If they want to do a little cleanup about the fraud of the Government, let them take a good look around New York City because they are pretty—they skate quite a bit around them; then they will know what it is all about. There is nothing so innocent as far as the community.

What is behind this? What is this fraud against the Government, with these two boys, one of them in Burma and the other in the Arctic Circle? They certainly wanted

to play fair with them, so it is split even, and that makes them feel so much better.

Well, anyway, Melvin Usdan came in. And what did he say? He said Martin was his little pal. Ladies and gentlemen, do you feel that in good conscience you can just take that testimony, that came from that boy, under oath, and just throw it out of the window? Was he broken down in his story, with all the skill of this relentless and merciless prosecution—in agreement, all their heads together? And they couldn't shake that boy, not even a little bit. And I was so proud of him as a witness. He was back on furlough, to see his widowed mother, to see his uncle who had been kindness itself to him, standing at the bar of 3062
justice because he tried to get this little boy a little more training. And then he tells the truth to us. And what is it? It is in this record. Captain Pepper testified to it. I knew it anyway, with my own sons, and undoubtedly you know. Every boy that goes in the Army is entitled to three months' basic training, where they send them out in the field, and they make them shovel and they make them get down to work, and they get them ready to meet those Japs that are going to shoot them down from the jungle, or those Germans that are going to shoot, those Germans that carry on their warfare that they have been trained for the last ten or twelve years. It would be merciless to send boys out of school, without giving them some training, and giving them a fair chance to take care of themselves when
they come to meet the foe; boys in their teens, hardly out 3063
of the baby stage—that is the crime of Samuel Bayer. That is why I am here arguing this case to this jury. Why, it is preposterous. Did he try to take them away from Uncle Sam? He took them by the hand, these three sons, and brought them down to the drillmaster and he said, "Take them; enlist." And then he knew any place after that that they went, and what did he see? Oh, he gets solicitous, ladies and gentlemen of the jury, about having them near

his home, out there at Far Rockaway, with the pals that they had been with, so that he could give them a good meal to stuff it in their insides, the mother and father. Is that a crime? Have you seen that go on in this country? Even myself, if I made any remark about that in my own home with my son, I would have to leave home mighty quick if I made any comment about my son being kicked around Washington. It was true. And I said I wanted him to go out in the field. My wife said, "You mind your own business. If I want my boy around here as long as the law allows, to put a little more flesh on him, to feed him and put a little more flesh on him, you go down to your office, you
3065 take care of your business, and you let me alone." I got into a real fight, ladies and gentlemen, and I knew when discretion was the better part of valor.

Now, where are we in this case with these boys? Did he try to duck enlistment? No. He had a weakness, Samuel Bayer; he was sick. There is one thing you can read of in this record. Every single witness that the Government offered, they said he was agitated, very much excited; beside himself, worked up on the verge of nervous prostration. And Jacobson told us the story that when he called up about his boy at Westover Field he fainted. We didn't cook up that story. That is not our witness. True, I went to see Colonel Jacobson, as I had a right, to ask him about what the facts were about the case. But that is his story. And he is a Government witness, and the Government
3066 offers him on the witness stand and stands sponsor for his truthfulness. He is not excited, no charges leveled against him.

While I am on that subject, because we must hurry on to the tires, that may bother you, I don't think there is any doubt at all when these officers came in and talked to Sam Bayer, and asked him about these uniforms and the like, and the tires, he denied everything; and when he was asked by Mr. Wallace about the tires, he made a birthday

gift of these tires to Colonel Jacobson, and he said that he did not. He should have said "Yes, I gave them to him." I don't think that he was truthful perhaps in giving that answer, but thought that Colonel Jacobson was not in this inquiry at all, that he thought he came down about the Radovich matter, he knew there was nothing wrong that Jacobson ever did for him at all, and I think he just wanted to save him from some embarrassment.

However, let us go back again to the record and see what Jacobson says about this. Jacobson is a Government witness. I am not vaporizing, I am talking about the record in this case.

3068

That is volume 5, page 74, and page 77:

"Q. You have spoken about fortification. * * * A. They were doing general clerical work, filing, and some typing, as I remember it, and general clerical work in this section.

"Q. And were you aware of any special consideration that was given to either one of these two boys, Colonel, at any time? A. No, sir.

"Q. Before you left for Albany? A. No, sir.

"Q. Were they treated, as far as you could observe, like any other privates in the Army? A. They were just soldiers.

"Q. Pardon me? A. They were just soldiers."

3069

Now I brought out a letter dated June 26, 1943, that Jacobson wrote Elias Bayer—they were very close friends, and there was nothing shown about any wrong conduct with their friendship; there is nothing wrong about buying a soldier a drink or to go out and have dinner with him. If that has become a crime in this nation, let us build a lot of concentration camps. Let us be honest about it. Let us all go to jail and take a vacation there and not be hypocrites about it in the courtroom.

I asked him:

"Colonel, I call your attention to the date of Exhibit 6, being June 26, 1943, * * * and I believe you just read that letter * * * A. Yes—I scanned it.

"Q. Well, with such attention as you did give to it, I will ask you if under date of June, 1943, anything had occurred in any manner in your relations with any of the Bayers, either Samuel or Elias, to cause you to believe that any effort was being made to in any way affect your judgment as an officer of the United States Army? A. No, sir."

3071 These are Government witnesses. The Government sponsors their truthfulness. This is the Government's case. The Government does not impeach this witness; it doesn't claim anything to the contrary. Not a word of it.

"Q. Is that correct? A. Yes, sir."

Now here is the next question, and Jacobson is an important witness. He may be discussed quite a bit by Mr. McGohey after I can't answer him.

"Q. Or to get you to affect any other officer's judgment in the United States Army on anything? A. No, sir.

"Q. Is that correct? A. That is correct.

"Q. And had you received the automobile tires at
3072 that time? A. Yes, I had.

"Q. And the uniform? A. Yes, I had.

"Q. And the automobile tires I believe you referred to as having received on or about your birthday, is that correct? A. That is right.

* * * * * *

"Q. And was anything said prior to the time that you received the tires, or at the time you received them,

or at any time you were at Mitchel Field to hook them up in anyway with anything that you expected or hoped to do? A. No, sir.

"Q. Or in anyway concerned with influencing your judgment as an officer? A. No, sir."

Page 78, Mr. McGohey:

"Q. Or let me put the matter bluntly, Colonel: Was there any effort that you could discern at that time, up to the time that you went to Albany, to get you to tamper in anyway with what happened to these boys?"

Now, wouldn't you think that Mr. McGohey would want 3074
an answer to that question of his own witness? I am going to read from the record, and here it is:

"Mr. McGohey: I object to that question.

"The Court: Sustained. You ought to ask him about it.

"Mr. Keenan: I will accept, your Honor.

"The Court: Very well.

"Q. Now, how did you happen to get the uniform? Just very briefly will you tell us about that?"

Remember, the story you got from the F.B.I. was that uniforms were discussed and they offered him uniforms, but when you get down to it—"Tell us how you happened to get the uniform." I am asking him that. 3075

"Who mentioned it to you, if anyone, or how you happened to go and get it?"

That is a fair question, isn't it? Isn't it interesting to find out about these uniforms, whether the Bayers—and they didn't give it to him; whether the boys—whether the Bayers offered it to them or said, "Wouldn't you like a uniform?"

Oh, "How do you like uniforms?" "Your uniform doesn't look good." It comes the other way:

"A. Well, I mentioned it. I mentioned I needed a uniform. Summer was coming on and I had only one summer uniform that fitted at the time, and there was in fact several of us that were talking about uniforms. We all were. I mean nearly everybody around the office when the time came to go into a summer uniform.

"Q. Yes. A. And Mr. Elias Bayer was present while we were talking about, and he suggested I. Buss. Well, I went down there and they said that they had never made an Army uniform before, and that they would
3077 take my order for it, and we talked about it, and they gave me a price on it, and I went in and they made the uniform. And the first one they made didn't fit. I did not like it and I refused to accept it. And they made another one and I accepted that uniform."

Now:

"Q. Of course, Colonel, if you had thought that in any manner anyone was trying to influence you in any improper fashion, you would not have accepted it, would you?" That is the Government witness. Wouldn't you think Mr. McGohey would like to have that question answered? He did not.

"Mr. McGohey: I object to that, your Honor.
3078 "The Court: Overruled.
"Mr. McGohey: I submit that has been answered.
"The Court: Overruled. Go ahead, Colonel.

"A. I would in no way compromise myself. I mean, it never occurred to me.

"Q. You would have been angry if you thought anyone was doing that? A. I definitely would, yes, sir."

Ladies and gentlemen, I can't go on reading all this record to you. You will understand that. But, please, if you think that I read just a part of it and a part that is favorable to me, and I don't see how that could be construed as anything other than a story, won't you in your deliberations ask to have the record read to you, and won't you be interested to see what Mr. McGohey will read about the record, about something direct in the case, not inferences, not the fringes, not the vaporizing around the edge, but his own witnesses?

Yes, ladies and gentlemen of the jury, that is the call of the roll on all these witnesses that were offered. I have not skipped one of them. I have gone down to the pertinent 3080
points of every single one of them. Perhaps I could read a little more here and there, but I spent the midnight oil and I tried to bring all the information I could.

So much for the uniforms. Is it fair for me to sum up and ask you to believe that the matter of uniforms came entirely innocently, that Elias Bayer never dreamed he was going to get into trouble when he went into the Copacabana that night, that when they came down to the office and wanted to get uniforms it was understood they were going to pay for them themselves, they were going to get them at cost from the tailors that attempted to balloon into Fifth Avenue tailors that didn't have the money? And what happened? This whole uniform business when you get down to it, these officers—remember, the Bayers couldn't see themselves in a court of justice; they were like other peo- 3081
ple, like people you knew, that you met, and say an officer wants to have a uniform—"can you help me get a uniform at cost?". And if you said, "Sure, I will do that," would you consider that you were trying to do something wrong with these officers? And have we fairly shown to you that the uniform business came from the officers to the Bayers and not from the Bayers to the officers? Didn't the impetus come didn't they ask for it? And was there anything

more done at the beginning in saying, "We will help you get it at cost"? And didn't the Government prove itself with the Buss men on the witness-stand, or the Busch men, whichever one it was, who said: Well, who, which party was going to pay for it? He said he was going to pay for it himself. What? The uniforms weren't any good. And this little man got vociferous. They get more vociferous, ladies and gentlemen, out there at Mitchel Field, close to metropolitan New York, than they would be if they were marched there out in the jungles of Burma, ill now; they wouldn't be thinking about the pink or the blue or the green of this uniform. But that happens. They didn't like the
3083 uniforms, they wouldn't take them. When they didn't take them the little fellows came to Bayer—they picked on him as being a multi-millionaire, though Ann Solomon who was here on the witness stand and kept the books said he was worth $100,000—and oh, don't you think anything was overlooked about the wealth of Bayer. The Government had the right to show that was not true in rebuttal. They have an accountant sitting here from the F.B.I. You have only seen half the operation. There is an accountant looking over the books. But they have you believe that this fellow was a multi-millionaire, corrupting the whole Army, whole battalions of them coming in.

The fact of the matter is that he was like you and I, and hundreds in our lives—the worst thing in the world anybody can do is to go to an in-law to get him to do a
3084 favor for a friend because then you are in trouble, then you have family trouble on your hands and that is not very nice, especially when the Busches said to Sam, "Here, you brought these officers in." What is it? And it all amounted to a few hundred dollars. He said, "Pay for it." And they said to him, when they questioned him down there in Mr. Wallace's office: Isn't it a fact that Radovich didn't pay for the uniform? Yes. And that you did pay for it? Yes. How do you account for the fact that you didn't go and collect that money from Radovich?

Did they think that Sam Bayer was going to sue Radovich for the price of that uniform, he being the commanding officer of his son out there in the field? Do you see any evidence in this case that Sam Bayer said to Radovich: Come in and get a uniform? I haven't time to go into his statement. It is here, you will have it with you. And, by the way, I wish you would take those statements with you in your jury room, especially Sam Bayer's statement and Elias'.

Now we have a situation where I believe we have shown that there was no effort made to keep these boys out of the Army. I believe it is shown, and it is shown by the little Melvin Usdan boy, as best we could. I wanted you 3086
to see Martin Bayer; all I could give you was his picture. Don't you believe, ladies and gentlemen, if that story had not been true about that boy spitting blood, having rickets, that you would have had these Army doctors on the witness stand? They know where to get them and they would have told you how much he ate, that he never was on sick call. They have all that before them. But Martin Bayer was a boy—the other boy described him—he said he had rickets and his chest was bent in. They may have said: We passed him on the examination. They got down to taking a lot of civilians in the Army and they weren't scrutinizing them too closely about their physical deficiencies either. We don't claim that this boy was a cripple or an invalid, but we do claim that he just passed eighteen, a
week after he enlisted, a week before he enlisted, and that 3087
the father wanted him to get some basic training and wanted him to be strong. The boy wanted to go in the Air Corps with his pals.

If you read one thing you will see another bit of this testimony coming through the record, you will see in that statement of Radovich that Sam Bayer asked him if he wouldn't put this boy up on the flying line, get him out of those bases, that wasn't his place as clerk. Look and see if

you can't find that, and then you will know whether or not we are manufacturing this story about this boy being a justifiable subject for some understandable tolerance or weakness on the part of his father.

Now, ladies and gentlemen of the jury, the Usdan boy told you, and it is undisputed in this record, that every boy is entitled to three months' basic training. And you know what basic training is. That is the training with the gun. That is the one thing that makes the difference between a high school boy, an office boy and a soldier. That is three months where you have to get up early in the morning, your muscles sore, but when you are through you are a
3089 soldier.

These boys were kicked around at that field and they never got any basic training. In God's mercy, when they get through playing chase with them out there, those officers, they had Melvin Usdan ready with one week's basic training to fly with the airborne engineers. Just missed it by a flash. Of course, the father went crazy when he found that out.

I want to get to the point of the payment of this money. I am sorry I can't agree with all the views of other counsel in the case, but I have great respect for the common sense of an American jury. It would be idle to tell you that there was not money passed in this case. Technically, I don't think they proved it. By bribery or not you have—but I don't care about that, there was money passed, of course.
3090 Sam Bayer—$7,000. No doubt of it. You heard about it. He told you the story. And I don't claim to be the best lawyer there is or even a fair to middling lawyer, but I surely know enough that when I am bringing him in to the United States Attorney, down to the tender mercies of this Southern District—if anybody knows what I am talking about, of what happened here—and bringing him in, and the case all atmosphere, with Philip Cochran in Time Magazine and all that stuff—but I say that what happened was this: that

Samuel Bayer's son was out—and thoroughly untrue—Radovich told him the outfit was being organized to go overseas. Read Radovich's statement. You will see that no such thing was true at all. Radovich's story is that these boys had to be transferred out of the Headquarters Fighter Command because there was talk out at the field about these uniforms. The boys hadn't done anything wrong. Naturally, the father was interested in his boy being transferred. And read Radovich's statement. Did Radovich say that Sam Bayer—and they are not very friendly, you can judge that—does Radovich say that Sam Bayer said, "Take him and keep him from going overseas"? No such thing. "Radovich," said Sam, "don't do 3092
that. Keep him for a little while longer, a week or ten days." And when he saw that they had transferred him, for some reason that I haven't got time to go into now, it hasn't anything to do with this lawsuit, they transferred him to Westover Field, in the Airborne Engineers, with no training—this boy that was his special weakness—the man went crazy. What happened? You have an old clucking hen like Sam Bayer, with that one weakness that he has for this one boy, that he wanted to have some training, and then you have a crazy man, because that is what Radovich was at the time—he had been dumped out of an airplane on his head or his shoulders, and his colleagues, friends killed; they had to keep him out a year and a half, move him out of the pursuit plane. There is where the fault was. The man was temporarily mad. He says he 3093
was mad. He says to Jacobson, "I must have been crazy, I was crazy." The Government says he was crazy because they put him in an asylum, and that crazy man ran into unfortunate Sam Bayer with his weakness for this boy. And what happened? He said, "Oh, don't transfer him, keep him there for a while." All that happened up to that time, ladies and gentlemen, would never have even been discussed, but Radovich saw a chance to make some money.

He said to Jacobson, "I wanted to take care of my wife and child. I was crazy, so I asked him for some money."

Now, ladies and gentlemen of the jury, there are more of God's witnesses. I wouldn't hurt a hair in Major Radovich's head, and if I could get General Ansell to take me into partnership with him I would be a delighted lawyer—that is what I think of him—but things are more serious, we can't indulge in personalities. I hate to say this, but do you remember when, entirely by accident, I ran into the 201 file, and I found out—did you get the significance of what I found out in that record? I found out that Major Radovich got away with some embroidery——

3095 Mr. Robb: We object.

Mr. Keenan: I will read it.

The Court: Wait a minute. Let me hear what counsel has to say.

Mr. Robb: Just a minute. I don't think that is a fair statement. It is not in this record, and we object to it.

Mr. Keenan: I will read the record.

The Court: You may read the record, you may argue the case.

Mr. Keenan (reading):

"I call your attention to the 8th sheet in this file"—this is Mr. Abram Whipple, that is the Government man that had those records; they were not very complete if you remember, and we had quite a set-to in

3096 getting anything out of them—"I call your attention to the 8th sheet in this file, coming down from the top, which I am unable to find bears any date. Perhaps you could help me. I don't want to disturb it" et cetera, "that is why I haven't disturbed the brads on it. A. That is referring to the basic letter of 24-2-45.

"Q. 24-2-45. And that was a letter from the Infant Jesus Orphanage of Mulagammuda, Travancore, to the

A.G.O.—is that Adjutant General? A. That is right, sir.

"Q. (Continuing) —stating that on February 5th they sent parcel post lace valued Rs. 3272.6 to Major Walter Radovich, A B P O 433 No. 1 Air Commandos Group, New Delhi, and would like help in collecting the debt. Is that right? A. Yes, sir.

"Q. Now does the record show—it wouldn't show anything more than that? A. I can tell you about it.

"Q. What about it? A. That is not the original letter. You have got to understand that military correspondence is entirely different from correspondence that is used in civilian life. That is merely a resume 3098
of what was in that letter from that organization, and all those endorsements that appear under this were endorsements that come through the office but we keep no record of them; you just make a notation as to what was in that particular endorsement. You reply by endorsement. * * * That is just military correspondence. * * *

"Q. I find out $100 was sent there by Radovich after he got back to this country. A. That is what that endorsement says.

"Q. In payment of those laces that he got from the Sisters of Jesus. A. So one endorsement states, but there is no correspondence about that in that file."

Mr. Robb: Is that all, Mr. Keenan? 3099

Mr. Keenan: That is what the record says.

Mr. Robb: If the Court please, Mr. Keenan made a statement before this jury that Major Radovich got away with some embroidery, apparently trying to imply that Major Radovich stole some embroidery from some Sisters out in India. And I say that his statement was highly prejudicial, and I move your Honor because of that statement at this time to withdraw a juror and declare a mistrial.

The Court: Motion overruled.

Ladies and gentlemen, you have heard read the testimony in the case about the incident that has been testified to by a witness and you may draw such inferences or you may draw no inferences from it. The effect of the testimony is entirely for you.

Now what counsel says to you, as he has told you, is not evidence in the case. He has a right to argue to you what he thinks you should draw from that testimony, but that does not bind you. The matter is for you, whether you should draw any improper inference or any inference at all or consider it as amounting to nothing. That is entirely up
3101 to you.

I overrule the motion to withdraw a juror.

Mr. Keenan: Ladies and gentlemen of the jury, what is read in this record is this: They sent parcel post lace valued rupees 3272 to Major Walter Radovich A B P O 433 No. 1 Air Commandos Unit, New Delhi, and would like help in collecting the debt.

Mr. Robb: And he paid for it. May we have that added, since Mr. Keenan wants it completed?

The Court: He has already read that.

Mr. Keenan: Is there anything before the Court, your Honor?

The Court: No.

Mr. Keenan: And he paid $100 for it in pursuance to this letter that was sent to the Adjutant General.

3102 Now, I am not saying that that is the real Major Radovich, but I am saying that that is the record of what happens to men in these strange war times that we lived in. He is nothing but a little slip of a boy himself, and I have great respect for him, for his citations for his bravery. And if we were talking about who was the bravest man in this court room, I don't think anyone could compete with Major Radovich. And I don't think he should be convicted for any offense in this case because I think he was

insane at the time that these transactions occurred; I think he was on his way to it. I think in the case of many of these individuals, great geniuses, they have moments when they have temporary aberrations; they are not using sound common sense. It is the only explanation that I can offer any kindness on, because when I heard the story of what happened I was sure I was getting the truth from Samuel Bayer and Elias Bayer.

There was no monkey business about that, ladies and gentlemen. We went down. And I had so much faith that they could answer any question they wanted, and the record shows that Mr. McGohey said in this case—I think it was in your hearing; anyway, it is not important to state 3104
it—that I was willing to have them examined in my absence or in my presence; and when you read these statements you will see that they are all, as far as Samuel Bayer is concerned, questions that were put by Mr. Wallace, not a single one put through me. And, of course, that is the reason and the only reason, that we did not require him to repeat that story again to you. We thought it was very unfairly presented by the Government when they tried to epitomize it and leave out the important parts when they came down to recite it.

And when we got this story, what was it? It was a story told word for word and incident for incident of what occurred in this case. He told exactly the sum of money, under what circumstances it was given. And the little F.B.I. man on the stand left out the statement, "I didn't 3105
know whether it was a holdup or a loan"—the first thing that was stated. But it was intimidation. He didn't want to leave his boy at the mercy of this man.

He said, "I want $500 to take my wife to California." That is what he said. And he gave them $450. Discouraged him. He didn't want to give the money. Entertainment was one thing. Or perhaps getting him a suit of clothes at discount is another. Men like Bayer, in that type of busi-

ness, they are doing that all their lives, getting things for one another at a discount. There is nothing wrong about it.

So he came down and told him his story. Here were these two boys. You can have your choice of one or two stories; you can't believe them both. And you are asked by this Court—and this is no criticism of the Court, which has my great respect—but the law says, not the Court, the law says that you must consider the Radovich testimony, statement, just for Radovich; Samuel Bayer just for Samuel Bayer, Elias Bayer just for Elias Bayer. I think that is rather a lot of nonsense. I don't think that there was ever a mind that existed, I don't think 12 lawyers could do it,
3107 and, with great respect, I am not sure that I ever met 12 Judges that could do it and be perfectly content in their minds that they hadn't permitted themselves to be influenced by some testimony of a vital nature specifically applicable only to another witness.

Now, ladies and gentlemen of the jury, I am told by the Court that my time is at an end. I have tried in my humble way to stick to facts, to stick to record. It has been very drab and uninteresting. I haven't attempted to create any atmosphere at all. I have stuck to stories that have been told under oath.

I ask you please to take the story of Samuel Bayer and Elias Bayer; it is in writing, it goes into great detail. You will find when you read it a lot of things that have nothing to do with it, that the Government was telling a
3108 cock and bull story, about a lot of insurance policies, about a lot of other names of people—I don't know who told them, I don't know whether it was Radovich in one of the earlier statements that had been made, but this I know: that the Government for some reason or other has not seen fit that you should see the first statement that was taken from Radovich on September 15th—they have it, and that ought to be the best one, and you have never seen it. There was another statement made by Radovich that is part of the

court-martial proceeding referred to, and you have never seen that. We couldn't offer it, because it is binding only against Radovich.

Now, Radovich tells one story. But I want to tell you this. It is a strange thing. Now I wish I were talking to judges and lawyers, because the story that Radovich tells about moving these boys to this Commando Unit and out to another, is *not binding on our men at all under the law*; that you can't consider, so the Court will tell you, as against our clients. I know you will consider it because you can't help it, because you are human beings. I don't think there is anybody who had the capacity to decide things that way, that is, to hold it against one and not consider 3110
it against another. How can anyone, in the name of common sense, divide one statement against another?

Now, I say that Samuel Bayer told an unpleasant story but an honest one. And when you get through you will find out that this sick man, all the evidence shows that, with a boy who was not in good health and who had not received his basic training—he was going to be catapulted overseas without it—struggling with Colonel Vidal, struggling with Jacobson—to do what? To stop it until the boy could be trained so that he would be able to take his chances with the other boys.

Now, I have said to you, ladies and gentlemen of the jury, the Government has not been defrauded. What is all the shooting for? What is the fraud against the Government? The boys are in Burma. The other one is in 3111
Okinawa. Three sons of Samuel Bayer—one is in Okinawa, and you know what that is; one is in Burma, and you know what that is, and the third little boy is on the high seas. After all, young Melvin Usdan is on temporary furlough, back from the Arctic Circle. They have done their job. Has the Government been cheated very much on their account?

I haven't time to argue this case of Elias Bayer. I can only say to you, with the utmost trust in God Almighty, that the lack of any evidence as to him would take you four hours to go through this entire record to show anything of importance. I am getting notes from my colleague that I haven't said anything about him. Because I can't find anything in the record to talk about Elias Bayer or why he is here at all.

Now, ladies and gentlemen of the jury, you are not here to determine whether bribery occurred or not. That would be the subject matter of another indictment. There was such an indictment. It was dismissed. And that is not
3113 your concern. I think you have a perfect right to say: "We have seen no evidence that convinces us beyond a reasonable doubt of any conspiracy to defraud this Government out of anything."

Now, I wish Martin Bayer was here. I told you there were two instances in my life that I never can get over—one of them was the loss of my boy, just coming into manhood and I didn't care very much what happened to me after that, and I never thought I could get up and talk to a jury again in my life, and that didn't happen very long ago. But I guess maybe that boy is listening to me some place and perhaps he can say a prayer in heaven to see that these homes are not smashed. And I can see this boy out in the jungles and perhaps saying, "Mr. Keenan, I can't be there. Won't you say something for me? Am I
3114 not entitled to any consideration? I have suffered jungle fever, I have seen the snakes, the reptiles and the Japs. In the name of God's justice what do they want to do with my father and my family? How many homes do they want to break up?" Samuel Bayer and his wife, who sits here, Elias Bayer and his wife; the young Usdan boy and his wife; Martin Bayer, the little Sanford boy.

Ladies and gentlemen of the jury, the other thought in my mind that I can't get out of was when I lost my

mother and came back to this country after the last war, into New York Harbor. There was no one there to meet me at the dock because I didn't want anyone there. My home was smashed. That is what the war did for me. It took my mother from me.

Now, ladies and gentlemen of the jury, the Fleet is in, and the Fleet will come in with these three boys when this thing is over, I mean, when their tour of duty is over, and they will be coming back to homes, or no homes or smashed homes or smashed lives, all of them. And if Sam Bayer has shown a weakness and parted with his $7,000 and almost ruined his life, hasn't he requited in any weakness on his part? Because a crime never was committed 3116
by that man in attempting to see that his boy got the basic training to which he was entitled.

Now finally, ladies and gentlemen of the jury——

The Court: Your time has expired but I will give you a minute or two more.

Mr. Koenan: I would like to ask a minute, your Honor, just a minute or two and I will be through.

They have spoken of Captain Kogan, he spoke about the toys. I have kept pretty well to the record in this case. I may be allowed a little latitude if I could indulge in a little timely bit of sentiment myself with friendly General Ansell or anyone who wishes to; and I want to say that in considering the story of Captain Kogan it has summed up to me what should be the philosophy of this entire case. It was old Coventry Patmore, the Irish poet, who spoke 3117
about the toys and when I get through telling what he said my lips will be sealed forever in this case in this courtroom. He said:

"My little son who looked from thoughtful eyes
And moved and spoke in quiet grown-up wise,
Have my law the seventh time disobeyed,
I struck him and dismissed with hard words and unkissed,

His mother, who was patient, being dead.
Then feeling lest his grief should hinder sleep, I visited his bed and found him slumbering deep,
With darkened eyelids, their lashes yet with his late sobbing wet,
And I with moan kissing away his tears, left others of my own;
For on a table he had drawn beside his head,
He had put within his reach a box of counters and a red veined stone, a piece of glass abraded from the beach,
And six or seven shells, a bottle with blue bells,
3119 And two French copper coins ranged there with careful art,
To comfort his saddened heart.
And so when that night I prayed to God and wept and said,
When at last we lie with trancèd breath, not vexing thee in death
And thou rememberest of what toys we made our joys,
How weakly understood thy great commended good,
Then fatherly, not less than I, whom thou has molded from the clay,
Thou wilt leave thy wrath and sa
I will be sorry for their childishness."

The Court: Ladies and gentlemen, we will take a ten-
3120 minute recess, after which we will hear the United States Attorney conclude the summations. He will be the last person to sum up.

We will take a ten-minute recess.

(Short recess.)

New York, October 22, 1945.

SUMMATION ON BEHALF OF THE GOVERNMENT.

Mr. McGohey: May it please the Court, General Ansell, Mr. Keenan, and ladies and gentlemen of the jury:

It is now ten minutes of four. We have been arguing this case since about twenty minutes of eleven this morning. I know you must be tired, we are all tired. I want to thank you for the very careful attention you have given to all the summation today. In addition to that, I want to thank you for the careful, painstaking attention that you gave to each witness as the witnesses testified from the stand. 3122

Now, I shan't have the time, I am afraid, at this late hour, to recite any poetry. My task now is to review as well as I can in the time that I have the evidence that has been presented. In my opening I indicated to you what I expected to prove on behalf of the Government, which I represent here, and my task now is to try to recall the evidence as it was presented so that you may recall from that evidence the proof that the crime here charged has been proved beyond a reasonable doubt.

Now, of course, if my recollection of the evidence does not accord with yours, it is your own recollection of the evidence that must prevail because you are the sole judges of the facts. And that is what makes your job so tremendously important. You and you alone are the judges 3123 who will determine whether or not the Government has proved before you beyond a reasonable doubt the crime charged in this case.

Now, what is the charge? The charge is that the three defendants named here, Samuel Bayer, Elias Bayer and Major Radovich, conspired to defraud the Government out of the conscientious service of officers of the United States Army and particularly to defraud the Government out of the conscientious services of the defendant Radovich.

Now, before proceeding to a statement of the evidence I think it may be helpful, it certainly ought to tend to clarification, to indicate what are not issues in this case. No defendant is on trial here for having a deep, abiding natural parental love for his children. It is perfectly normal, and I as a father of a boy in the service and other boys feel that it is a perfectly normal instinct in my having a desire to protect my sons. There are times, however, when this normal instinct to defend and to protect our offspring must give way to a higher necessity. There are times when the nation is in danger, when all of us must set aside our own lives, if need be, and the lives of any
3125 loved ones in order to carry out the defense of that nation. And we have been in such a time, and these acts charged here occurred during such a time. And any person who evades that tremendously important, that sacred obligation violates not only the laws of the United States but he violates a fundamental law of civilization which says, "Do unto others as you would have others do unto you."

It requires no fine spun reasoning on my part to indicate to you the inevitable result of illegal acts such as those which were demonstrated and proved in this case. The task which one man can't perform because somebody prevents him has to be performed by somebody else. And if the answer to that is that the parents of children may let their love of children prevent those children from per-
3126 forming their duty, then what of the millions of parents of millions of sons in our armed services? Are they to be condemned because they didn't resort to the means resorted to here to protect their sons? Will anybody say that the parents of Sergeant Levin in Brooklyn, or Major Bong, out in the West, or for Johnny Basilone, from Passaic, did not love their children just as much as Sam Bayer loves his?

Now, another thing that is not in issue is the courage or the gallantry of this young officer. Major Radovich, of

course, served his country well and bravely, and I as a veteran would be the first to deny that that was not so. But that is not at all material as to his guilt or his innocence in this case. All history and experience demonstrates that physical and moral strength are not always fused in the same individual. History is replete with the moral derelictions of those whose physical courage was never questioned. The laws of this land must be obeyed by all and must be enforced against all, the strong and the weak, the brave and the timid, the rich and the poor. In the eyes of the law, all men are and must remain equal. That is the essence of our democracy. And the standards of guilt or innocence must be the same for all. And so we are not 3128
now concerned with punishment in this case. That varies with an individual and takes into consideration his traits as well as the crime that he commits.

And whether or not these boys Melvin Usdan and Martin Bayer had adequate training is likewise immaterial to the charges here made against these defendants. However, I do call your attention to two bits of evidence in this case, one the enlistment application of both of them, which are in evidence. Those enlistment applications state that the boys were examined and that they were certified to be in good health to be soldiers. And the second thing I call your attention to is Exhibit D, I think it was, that batch of correspondence which contained the application signed by Martin Bayer for his transfer from the First Fighter 3129
Command to the Medical Detachment. He stated in that that he had received his basic training at Camp Upton. And Melvin Usdan, the nice young lad on the stand, testified that he had signed a similar application.

And then one more thing that is definitely not in this case as an issue and that is whether the Bayer and Usdan boys did their duty. I certainly make no claim that they did not do their full duty. They are not charged with that. I believe that those boys did their duty as soldiers

of the United States of America and as well as they could under the limitations that were imposed on them by the acts of these defendants.

And neither are we concerned here with the guilt or innocence of anybody else except the defendants in this case. The fact that others such as Lieutenant Roeser, Captain Kogan, Colonel Jacobson, Colonel Pepper, Major Saffron, Harold Busch, Joe Busch, Phil Busch, or even Miss Solomon or any others may have had knowledge of and may have served the aims of this conspiracy is in no wise material to the issue before you ladies and gentlemen. The guilt of the defendants is not lessened in any degree
3131 by the possible guilt of others.

On the other hand, the Government is here required to show only proof of the charge, namely, that these defendants conspired to defraud the Government of its right to the honest services of this one Army officer, Major Radovich, the defendant on trial.

Now, it is hardly to be expected that a conspiracy of this kind, or indeed any conspiracy, as Mr. Keenan indicated, would ever be evidenced by a writing. In discussions such schemes are usually concocted. The evidence, then, necessarily is largely circumstantial. But in this case we have not merely the usual circumstantial evidence. We have in addition to a mass of circumstantial, compelling circumstantial evidence, the admissions made by each defendant against his own interest.

3132 The evidence outlines clearly occurrences and circumstances related to and integrated with and generating from the plan of the defendants Samuel Bayer and Elias Bayer to defraud the United States of the right to the honest and faithful services of officers and particularly the right to the honest and faithful services of Major Radovich.

The purpose and aim of the conspiracy was to prevent Martin Bayer and Melvin Usdan, the son and nephew of Samuel Bayer, and the nephews of Elias Bayer, from being

sent overseas. The plan orginated with Sam Bayer and Elias Bayer and it was later concurred in and actively furthered by Major Radovich.

Samuel Bayer did not want his son or nephew to be sent overseas. He learned late in 1942 that on December 15th of that year enlistments would end. Captain Kogan and Major Saffron both informed him that men who were drafted had no choice in the arm of the service in which they would perform their duty. Kogan further informed him that most inducted men, men who came through the ordinary draft process, went to the infantry. And so on December 15th, the very last day for enlistments, these two boys were enlisted in the Air Corps of the United 3134
States Army. Ten days later they are asigned to Mitchel Field. They are there classified as clerks and assigned to the Base Headquarters and they remained there until April 15th, approximately, 1943.

Now, during the four months between December and April of 1943 the evidence clearly shows that these two men, the Bayers, wined and dined and entertained various officers in the First Fighter Command stationed at Mitchel Field. Now, I ask you to bear that in mind—the officers they were entertaining were in the First Fighter Command; the boys up to this time were at the base, up to the 15th of April. In addition to that, the Bayers caused to be outfitted some of the officers with uniforms which were paid for by Bayer. At that time, in April, the 3135
Women's Army Corps began to replace clerks at the Base Headquarters in Mitchel Field where the boys were then serving. This information had been received by the Bayers. In addition, they were informed that the boys who were so replaced by the Women's Army Corps were being pooled for shipment to some other military post. The testimony of Colonel Jacobson is that he was told by Colonel Vidal that one of the Bayers had requested him, Vidal, to arrange for the transfer of the boys to the First Fighter Command

because the Women's Army Corps were replacing the clerks in the base command and the boys were scheduled for shipment out of the post as a result of that. The testimony of Captain Kogan is that he was informed by Sam Bayer that he, Sam, was able to arrange for the transfer of the boys to the First Fighter Command, which had become advisable, and that testimony you will find on—we have marked these volumes by letters, and in volume E, pages 189 and 190, that testimony of Captain Kogan will be found. Now, by that time the Bayers had cultivated the friendship of these officers. Bear in mind, I ask you to remember that the officers they were entertaining were
3137 officers in the First Fighter Command. The Bayers had cultivated these officers attached to the First Fighter Command and they were in a position to solicit the aid of those officers toward effecting the transfer which was required in order to avoid shipment of the boys out of Mitchel Field. The transfer we know was effected on April 15, 1943, from the base to the First Fighter Command.

Now, a short time thereafter, about April 21st, the testimony was, 1943, the evidence shows that there was a party tendered to Colonel Jacobson at the Waldorf-Astoria Hotel by Sam Bayer, and that very night Sam Bayer gave a new set of tires to Jacobson. Now, you know as well as I do, ladies and gentlemen, that in April, 1943, it was almost impossible to obtain new tires. And Jacobson's testimony is very clear about that.

3138 Mr. Keenan: I object to that, your Honor. There is nothing in the evidence about how difficult or not it was to get tires.

The Court: I overrule the objection.

Mr. Keenan: Exception.

The Court: Go ahead.

Mr. Robb: We do not object, if the Court please.

The Court: Overruled.

Mr. Robb: We do not object.

Mr. McGohey: Jacobson was quite definite about that, ladies and gentlemen. Jacobson said they were not recapped tires; they were brand new tires.

Now, compare this testimony of Jacobson with the Bayer statement in this office. Bayer denied that he ever gave any tires. I understand Mr. Keenan in his summation to concede that Bayer had actually given the tires. But he denied it in his statement in this office. But you have to compare Jacobson's position with Bayer's position to determine who was telling the truth and who was making an honest, straightforward statement. Jacobson had nothing to gain when he made that admission from this stand; he was testifying to something that was not any credit to an 3140
officer of the United States Army, that he let the father of a couple of boys in his outfit buy him new tires. There was absolutely no reason in the world for Jacobson to lie about that. Jacobson had to be telling the truth when he told that. But when Bayer denied it in February in this office he had every reason in the world to deny that, he had every reason in the world to try to save himself. And he denied it again when he talked to Colonel Snyder, you remember, in August, 1944.

Well, now, to come back to the history of the transfer. Some time in July, 1943, rumors were current at Mitchel Field that gifts had been made to the various officers of the First Fighter Command and that they had been entertained by the Bayers, which, of course, the evidence shows is a fact. It therefore became necessary to get these boys 3141
out of the First Fighter Command in order to avert suspicion from the officers who were identified with the unit. And Radovich was the commander of the First Fighter Squadron. He was very anxious about that, particularly concerned about it, and he told Sam Bayer that. So Sam Bayer says, "Let's have a week." And meantime he works out some plan to get the boys into the Medical Detachment, and all that he needed then, and transferred out of the——

Mr. Ansell: Pardon the interruption, please, sir. You say "he works out some plan." May I ask what the "he" refers to?

Mr. McGohey: Sam Bayer. All he needed then was to get an approval of that transfer out of the First Fighter Command. And the first man along the line that had to give an approval to a request by either Martin Bayer or Melvin Usdan was whom? Radovich, the commanding officer of the squadron in which they were serving. And Radovich undertook to bring that about. The record discloses what happened. Here it is, Exhibit D. Defendants' Exhibit D, the application signed by Martin Bayer asking
3143 to be transferred to the Medical Detachment; first endorsement, passed on for remarks by Major Radovich, then it goes through various other hands, gets over to Fabbricatore and the station hospital at Mitchel Field, then it comes back to Radovich, and on the third endorsement he approves it. Then, you recall, it went on. Finally it got to a commanding general who said he would not approve it because there was a shortage of clerks in the Fighter Command and they ought to put these boys where they would do some good work. And by that I don't mean to impinge or to suggest that the boys, wherever they worked, did not do good work as well as they were permitted to do. Then a mutual transfer was arranged which meant that somebody else came into the Fighter Command in order to take
3144 the place of the two boys that went to the Medical Detachment. And it came back again and Radovich approved it again. That is Exhibit D, ladies and gentlemen.

Now, some of the evidence with respect to the arrangement for that transfer varies. In the statement of Sam Bayer, which is in evidence, he claims that Radovich told him that the boys had to be transferred because the outfit was being broken up and that Radovich thereafter arranged the transfer to the Medical Detachment. Radovich in his statement claims that the boys were being transferred

because of these unsavory rumors around the field about the entertainment. The records, this Exhibit D that we have been looking at, show that the outfit was not being broken up, as Sam Bayer says Radovich told him, but that actually there was a shortage of clerks. And, in fact, the transfer was not able to be effected until two men came into the First Fighter Command to replace Martin Bayer and Melvin Usdan.

Now, I believe that the fact before you supports the statement that the transfers were made because of the rumors regarding these two boys. In any event, these facts we do know and they are uncontradicted, that the transfers could not go through without Radovich's approval, that 3146
Radovich did give his approval, that Radovich received either $1950 or $2,000 in cash from Samuel Bayer either during the period while the transfer was being effected or shortly thereafter. There is no dispute about that. Radovich had to approve, Radovich did approve; Bayer gave about $2,000 and Radovich got about $2,000. It is undisputed that the payment of this money was——

Mr. Ansell: If your Honor please, I certainly am reluctant to interrupt the District Attorney, but we must try to adhere to the facts in the record, and I know Mr. McGohey wants to, but Mr. McGohey has just made the statement that it is indisputably proved in this record that Radovich received $1950 practically contemporaneous with that transfer. I think that Mr. McGohey is not correct in that. 3147

The Court: Ladies and gentlemen of the jury, as I explained to you before, the statements made to you by counsel as to the evidence do not pretend to be evidence themselves. You had heard from counsel for all parties giving you their impressions of what the evidence was and what inferences you should draw from the testimony. Now, with that qualification, or with that caution, I will permit the United States Attorney to proceed.

Mr. Ansell: I thank you, your Honor, and I wish to beg Mr. McGohey's pardon.

The Court: All right, sir. I wish also to call attention of counsel to the fact that, as far as I can recall, Mr. McGohey did not interrupt any counsel during any part of their argument.

All right, sir. Proceed.

Mr. McGohey: Ladies and gentlemen, on that question that has just been raised by General Ansell, in view of the lateness of the hour, I am not going to take the time to reread statements which I read once before, the statement of Major Radovich, but I ask you on that question to look
3149 at page 10 of his statement when you undertake your deliberations, the question of whether or not Radovich got $2,000.

Now, there can't be any question but that Sam Bayer and Elias Bayer were greatly seeking that transfer from the First Fighter Command to the Medical Detachment. I am reading from Volume D, page 9, the testimony of Lieutenant-Colonel Vidal. My question was, "Will you tell us the substance of that conversation? A. I was informed by Mr. Elias Bayer and Mr. Samuel Bayer that Martin Bayer and Private Usdan were being transferred from headquarters First Fighter Command to the base hospital at Mitchel Field. They requested me to ascertain if these orders had been written at that time."

Mr. Keenan: What page?

3150 Mr. McGohey: It appears to be actually 90h.

Then on the next page, 100h, "Q. What, if anything, did Mr. Bayer say to you?

"Mr. Keenan: Which Mr. Bayer?

"Q. Mr. Samuel Bayer. A. Mr. Samuel Bayer? As I recall, he wondered if I could do anything about expediting the issuance of the orders."

Now, then, within a week after assignment the boys were transferred again, this time to the Airborne Engineers—

one of them sent to Bradley Field, in Connecticut, and the other was assigned to Westover Field, in Massachusetts. And when Sam Bayer learned that this transfer was going to take place he and Elias immediately rushed out to Mitchel Field and again they saw Colonel Vidal and they pleaded with him to prevent the transfor. Bear in mind there is no contradiction of Vidal's testimony. I join Mr. Keenan in asking you if you have any doubt about what the truth is in what I say when I quote the testimony to you, you can send for those records—the Government has a set as well as the defense, and we will give you both so that you can see whether we are telling the truth. Vidal says that the two Bayers, both of them, Sam and Elias, told 3152
him that the boys were about to be transferred to an aviation engineers' unit which was scheduled for overseas shipment, that Sam Bayer was very much upset, that he was worried; and Vidal explained to him that the Airborne Engineers was a relatively nice, fairly safe type of work, but Sam Bayer was still wondering whether or not the boys could not be kept from being placed in this outfit. Sam Bayer asked him if he, Vidal, could do anything about it and Vidal told him he could not. However, even after that personal visit, you remember the testimony of Vidal, that they came there, Mitchel Field, and he saw them at the gate; after that they had him on the telephone, and in at least one conversation Sam Bayer again pleaded with Vidal to see if he could not prevent his son and his nephew from being transferred to the Airborne Engineers. Well, 3153
they were not able to get anywhere with Vidal, apparently.

So Sam Bayer then thought of Saffron, Major Saffron. You remember he is one of the men that he talked to in 1942 before the boys went into the ground crew of the air forces. So he called on his brother-in-law Joe Busch and he asked Busch if he wouldn't get in touch with Saffron and find out if the major could do anything to get the boys out of the Airborne Engineers. Busch arranged the ap-

pointment for Saffron to meet Sam Bayer and they met that same evening up at the Governor Clinton Hotel and they had a conversation, Saffron, Sam Bayer and Busch.

Now, it is significant to recall, and you should consider, where the conversation that the three of them had was held. It was in a taxicab driving around the streets in New York. The same kind of furtiveness that characterize the payments, according to Sam Bayer's story, the furtiveness that characterize the payments of various sums of money that make up the approximately 1900 or $2,000 that Bayer paid to Radovich when the boys were transferred from the First Fighter Command to the Medical Detachment. And here
3155 is what Major Saffron says occurred in that taxicab, and I am reading from Major Saffron's testimony, Volume E, page 57, at the bottom of the page:

"Q. Will you tell us the substance of that conversation, what you said and what Bayer said and what Busch said? A. Sam Bayer said, 'I would do anything in my power to keep my boy from going overseas'."

Saffron's testimony is supported by Sam Bayer's own brother-in-law Joe Busch, who was in there in the taxicab with him. Volume D, page 35, the direct testimony of Joe Busch:

"Q. What was that conversation? A. Mr. Bayer asked him if there is anything that could be done for him.

"Q. Mr. Bayer asked whom? A. Major Saffron—if anything could be done for him, and he said, 'Nothing.'

3156 "Q. Did he say anything could be done for him? Did he say what about? A. About the boys.

"Q. And what did Major Saffron say? A. Major Saffron told him that there was a rumor around that Mr. Bayer had spent a lot of money."

That is Bayer's own brother-in-law.

Sam Bayer was unable to get any help from Major Saffron, so next he turned to Lieutenant-Colonel Jacobson, who by this time had left Mitchel Field, you will recall;

and was stationed up in Albany. He called Jacobson on the telephone and he pleaded to do something to get the boys out of the Airborne Engineers, which he described—and by "he" I mean Sam Bayer—in his conversation with Jacobson you will recall Jacobson testified that Sam Bayer said the boys were in a hot outfit, an alerted outfit, and Jacobson stated to him that nothing could be done, that nothing should be done, and that he, Jacobson, thought that Sam Bayer had been a very indulgent father and he thought he ought to let these two boys alone.

You will recall that Jacobson further testified that during that conversation Elias Bayer came on the telephone and said that Sam had fainted, and the following day Elias 3158
called and again he told him that Sam was very sick, that the boy's going had him very worried, and again Elias asked Jacobson if something could not be done.

Now, the next undisputed bit of testimony in this case is that some time in the latter part of August Radovich went to Captain Pepper and he asked Captain Pepper to find out where the boys are located. Pepper did and he told Radovich that they were with the Airborne Engineers, one at Westover Field and one at Bradley Field. Now, it was perfectly natural for Radovich to go to Pepper. Pepper was a classification officer, you remember; he was a man that worked in an office and he was familiar with the procedures of transfer. Radovich asked Pepper if there was any way of getting the boys out of the Airborne 3159
Engineers. He told Pepper that he was acquainted with the boys' families and that he would like to see them transferred out of the Airborne Engineers.

You will find that testimony, Mr. Keenan, in Volume E, page 99.

Pepper informed him that this could not be done because the two units were organized and activated for overseas duty as far as he, Pepper, knew, and they had a relatively

high priority, and that as far as Pepper knew he did not believe they could be transferred to any outfit except some other overseas outfit which had an equally high priority. And two or three weeks later, according to Pepper, Radovich called him on the telephone from Washington and asked Pepper if the boys were still at Bradley and Westover Fields. Then he asked Pepper whether he believed that a request to transfer the boys from the Airborne Engineers to the Air Transport Command would be able to be approved. Pepper told him that he did not think so, that inasmuch as the Air Transport Command was at that time predominantly a continental installation, he did not know
3161 that it had any priority. And some time about the end of September, 1943, Radovich made a personal call on Pepper at Mitchel Field, he came to his office, and he talked again about getting the boys transferred out of the Airborne Engineers. And this time he had a definite plan and he submitted it to Pepper to get his opinion as to whether or not he thought it would work, and asked Pepper if a request for the transfer of the boys to the Air Commando Group would be approved. Pepper told him that since the Air Commando Group was a special mission and had the highest priority in the country, he thought that kind of transfer would be approved. Then Radovich asked Pepper if Pepper thought after Radovich got the boys out of the Engineers and into the Air Commando Group, he could
3162 then get them out of the Air Commando Group. And Pepper's reply to that was that in all fighter groups that he had any familiarity with or any knowledge of, prior to shipment overseas all surplus personnel were dropped from the organization that was going out. Then Radovich said that he was going to request the boys and through a connection which he had in Washington he would transfer them to the Air Transport Command when the Air Commando Group left this country. That is Pepper's testimony.

While these negotiations between Radovich and Pepper were going on, let us see what Sam Bayer was doing about getting the boys out of this Airborne Engineers outfit. According to Captain Kogan, and his testimony is not contradicted in any respect, Sam Bayer some time late in September, 1943, in the company of his son Robert Bayer, visited Captain Kogan at his apartment in Garden City and they had a conversation. And I am reading from Kogan's testimony, Volume E, page 196, at the top of the page:

"A. Mr. Bayer told me at that time that Martin was in an alerted unit for overseas at Bradley Field, the Aviation Engineers, and he asked my opinion, if I thought there 3164
would be any trouble if the boys—that boy, his son there, was transferred away from there. I tried to tell Mr. Bayer at that time that I thought there would be very serious consequences, and Mr. Bayer cried and—" and the answer breaks off.

"Q. What did he say? A. Well, the gist of what he said was he wanted him out of that alerted unit for overseas into another unit."

Now let us get back and see how Radovich was getting along with these negotiations with Pepper. Pepper says that Radovich told him that it would be worth Radovich's while and that Radovich would make it worth Pepper's while to carry out the transfers out of the Airborne Engineers into the Air Commando Unit and thence into the 3165
Air Transport Command. And Radovich, you will remember, made good on that commitment to Pepper. In December, 1943, he walked into the First National Bank in West Palm Beach and he purchased a cashier's check in the sum of $500, drawn to the order of Captain Jack Pepper, and he mailed it to Pepper at Mitchel Field. You will remember that the records of the bank proved that. You will remember they were introduced here by the gentleman, an

officer of the bank, and they are Exhibit 20 in evidence and you can call for them and have a look at them. That check was never cashed by Pepper, as evidenced by the fact that Radovich wrote to the bank the following year, in August, 1944, and his letter is Exhibit 24 in evidence, and he asked the bank what were its requirements in order to redeem the uncashed check.

After Radovich formulated his plan he went to work to carry it out. Miss Goertz, the young lady from the personnel section in the Air Forces headquarters section in Washington, testified, and her testimony is in no wise contradicted; she testified that on the 22nd of November—
3167 please try to remember that date, 22nd of November, 1943—Radovich walked into her office and, as he had the authority to do, asked her to issue an immediate telegraphic order for the transfer of the boys from the Airborne Engineers to the Air Commando Group; and he told her at that time that he was doing this as a favor for a friend. She issued the orders that very day.

Now, two days later, on November 24th—please remember that date—Radovich called her on the telephone from Goldsboro, North Carolina, where the Air Commando Group was stationed, and told her that the group was up to strength and that the two enlisted men were not needed, and he asked her to request the issuance of new orders to take the boys out of that project and to reassign them to
3168 the Air Transport Command in Wilmington.

On the very following day, November 25th, a letter requesting the transfer out of the Air Commando Group was sent from headquarters of the Air Forces in Washington, and that appears in Government's Exhibit 4, which is the actual order that transferred them out of the Commandos and into the Air Transport Command.

Now, ladies and gentlemen, I repeat again that I would like you to direct your attention particularly to those two dates that I have just been talking about, November 22,

1943 and November 24, 1943; those dates are very important and I will come back to them very shortly.

Somewhere about the time that the boys were transferred out of the Air Commando Group to the Air Transport Command, Sam Bayer, through some agents of his, paid $5,000 to Major Radovich. There is no conflict between the statements of the Bayers and the statements of Radovich on that fact.

Now, at this point, the object and the aim which Sam Bayer and Elias Bayer had clung to so stubbornly against the advice of their friends, against the advice of Captain Kogan and Colonel Jacobson and Colonel Vidal and Sam Bayer's own son Robert, was achieved—the boys had been 3170
taken out of the Engineers Division, which was getting ready for overseas duty, and put into the Air Transport Command, a unit which was destined to remain in the continental United States.

At this time, and indeed throughout the entire ensuing period up to February of this very year, the Bayers made no complaint against anyone on account of these transfers or on account of any money that was paid. In fact, the evidence indicates, rather, that they were grateful to Radovich or to anyone else who may have been of any help in effecting those transfers. You will remember that in August, 1944, Colonel Snyder, the Army investigating officer, asked the Bayers to give him whatever facts they might have or they might know concerning Radovich, whom he was then investigating, and he so told them. 3171
Now, instead of seizing on this chance to have Radovich punished if he had been extorting money from him, they denied to Colonel Snyder that they ever paid even for the uniforms, they denied that they ever offered money or gave gifts to any officers, they denied that they ever asked for the transfer of the boys, and indeed they claimed that they had no information of any kind to give Colonel Snyder about Radovich.

Now, of course, when Colonel Snyder was up there asking them these questions, Sam Bayer knew, Sam Bayer knew very well, that there were in existence some records that would show he paid for those uniforms which he denied paying for. So what did he do? He runs down to his brother-in-law, the Busches, and he gets hold of Harold Busch—you remember he testified on the stand here as a man who kept the records for the Buss Company; and according to Harold Busch, Sam Bayer's own brother-in-law, Sam Bayer stood alongside of Busch for a couple of hours, and you will find that in Volume E, page 83, directing the changing of the Buss Company records
3173 so as to obliterate the evidence that the Plymouth Thread Company, Sam Bayer's Company, had paid for those uniforms.

Now, there is in evidence in here, Exhibit 7, and you remember we looked at that at the time it was introduced. Here are some of the changes that were made: Order No. 5512, that was changed and as changed it becomes a job lot of thread to the Plymouth Thread & Yarn Company for $346.99. Order No. 5580, that was changed and as changed it becomes a charge against Plymouth Thread & Yarn Company, one piece of cloth for Ann Solomon. And order No. 5604 was changed and as changed it becomes a charge to the Plymouth Thread & Yarn, one pair of enlisted men's trousers for Robert Bayer. Remember this, you can look at that, ladies and gentlemen.

3174 Now, note the kind of changes. Sam Bayer, the testimony is, sat alongside his brother-in-law Busch, who made these changes. And whose names? His own company, his own secretary and his own son. He picks out three people who in the event of any challenge or question about those changes he knew in the normal course of life, in the normal course of human-relations he could depend upon.

But in addition to this compelling accumulation of independent evidence, we are not relying and we do not have

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to rely in this case on that merely. We have the admissions of each defendant against his own interests. Under the Court's instructions each man's admissions can be considered by you only as against the man that made them, and under that limitation I ask you to let us look at the record, as Mr. Keenan said—quoting the great Governor; well, let us look at the record and see what Sam Bayer's statement shows as to his participation in the conspiracy. It shows the following:

One, that he entertained various officers, all of whom were connected with the unit at Mitchel Field to which the boys were attached.

Two, that he paid for uniforms for those officers.

3176

Three, that he made numerous gifts to Radovich.

Four, that he paid approximately $2,000 to Radovich during the time when the boys were being transferred from Radovich's First Fighter Command to the Medical Detachment at the base at Mitchel Field.

And, five, that he sent $5,000 to Radovich for the transfer of the boys out of the Commando Unit to a unit which was destined to stay in this country.

Now, let us see——

Mr. Keenan: Just a moment. I object to that statement. That summation is absolutely false. He made no such admission in that statement. I object to it.

The Court: Mr. Keenan, it is perfectly apparent that the United States Attorney is not quoting from it; he is giving a summary of what he considers it to mean. The statement itself will be before the jury. The District Attorney is not purporting to read from it. He is arguing what he considers to be a synopsis of the case.

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Mr. Keenan: But, your Honor, he is now quoting an admission, not a synopsis of the case.

The Court: No. He is not undertaking to quote at all. You may proceed.

Mr. McGohey: May I proceed, your Honor?

The Court: Yes, you may.

Mr. McGohey: Thank you.

Now, let us see what Eli's statement shows as to him. It shows, one, that he entertained various officers, all of whom were connected with the outfit to which the boys were attached at Mitchel Field. It shows that he introduced these officers to Sam Bayer and thereafter took them to the I. Buss Uniform Company and made the necessary arrangements for outfitting them with uniforms. Three, it shows that he asked numerous officers to help to get the boys transferred out of the Airborne Engineers.

3179 Four, it shows that he traveled to Goldsboro with the pay-off, when the $5,000 was given to Radovich.

Then let us go on and see what Radovich's statement shows as to him. It shows, first, that he was extensively entertained by the Bayers; second, that he was given the right to sign Sam Bayer's name to checks at the Waldorf-Astoria Hotel, although he denies that ever used that privilege. It shows that he received free uniforms; that his wife received a set of silver, Waldorf-Astoria silver, from Sam Bayer; that he approved the transfer of the boys from the First Fighter Command to the Medical Detachment at the base; that he received approximately $2,000 from Sam Bayer for approving that transfer; that he worked out a plan and arranged for the transfer of the boys from the Airborne Engineers through the Air

3180 Commando Unit to the Air Transport Command; that for doing this he received from Elias Bayer $5,000 in cash at Goldsboro; that he sent a draft for $500 to Captain Pepper at Mitchel Field from a Palm Beach bank in payment for his advice in connection with the plan for transferring the boys out of the Airborne Engineers.

Now, there is no contention that the statements of the Bayers were other than voluntary statements. That claim has not been made. Indeed, the statements themselves show——

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Mr. Keenan: I object to that statement as not in accordance with the record, as your Honor knows it to be.

The Court: I don't see anything improper in the argument.

Mr. Keenan: We have made the contention before this Court in the absence of this jury——

Mr. McGohey: If it was in the absence of the jury, Judge, I submit it should not go in here——

The Court: I may have something to say to the jury about that tomorrow.

Mr. Keenan: I beg leave to state at this time that he is not commenting upon what the evidence is. He says there is no contention upon our part. To the contrary, 3182
the record will so show. And that is not true——

The Court: I will undertake to state what is true. There was objection to the statement——

Mr. McGohey: Before the jury, your Honor?

The Court: No. I do not see anything wrong.

Mr. Robb: If your Honor please, at this time I move for the withdrawal of a juror and a declaration of a mistrial on the ground of prejudicial statements that cannot be corrected at this time.

The Court: Motion overruled.

Now, will you come up?

(The following proceedings took place at the bench out of hearing of the jury:)

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The Court: I recall objection was made to the introduction of the Bayer statement, but I am not definite upon what ground the objection was made.

Mr. Keenan: On the ground that they were induced and therefore were not legal voluntary statements. That is the sole ground of it. The record will show that, your Honor. It is very clear.

The Court: All right, sir.

Mr. McGohey: Not before this jury, your Honor.

The Court: You may have your exception.

Mr. Keenan: I know differently.

(The following proceedings were had in the hearing of the jury:)

The Court: On that, ladies and gentlemen, I anticipated myself a little. I will go into more detail tomorrow. Objection was made to the introduction of the Bayer statements, objection was also made as to the Radowich statement, upon the ground that they were not admissible in evidence because not voluntary. I heard evidence on that
3185 issue and ruled that they were admissible and admitted them into evidence. I have permitted testimony about the circumstances attending the giving of all three statements or what bearing such testimony has in your minds in considering the weight to be given to the statements which you have heard in evidence, and I will be a little more explicit about that tomorrow.

All right.

Mr. Keenan: I ask your Honor to charge this jury that a statement made by the District Attorney that those statements were admitted without any objection is not true and that the jury be so instructed at this time.

The Court: I am not sure exactly what the District Attorney said, but if it was a statement that the statements
3186 of the Bayers were admitted without objection, then that would no be entirely accurate.

Mr. McGohey: I did not say that, your Honor.

Mr. Keenan: He said there would be no contention that these were not voluntarily admitted or given. And that is not in accordance with the record.

The Court: That is not in accordance with the record. And he says he did not say it. Now, proceed with your argument.

Mr. McGohey: I am going to read from Government's Exhibit 8, which was the statement of Samuel Bayer in evidence:

"Q. I understand that you want to make a voluntary statement in connection with the matter on which you were arrested on the complaint some months ago. A. Yes.

"Q. And you have consulted your attorneys in the matter and they have advised you to make such a statement? A. Yes.

"Q. You understand that the statement you do make might or could be used against you later in any criminal proceeding, don't you? A. Yes."

Mr. Keenan: Your Honor, I ask at this time that the 3188
jury be instructed that there are legal questions involved.

The Court: I shall instruct the jury on that tomorrow.

Mr. Keenan: And that the statement, merely a statement of the word "voluntary" as understood by jurors, and "voluntary" as understood by the law, may very well be different.

The Court: I shall mention that in my charge tomorrow. And you may proceed with your argument.

Mr. McGohey: I am reading now from Government's Exhibit 19 in evidence, the statement of Samuel Bayer:

"Q. Mr. Bayer, have you spoken to your attorney about coming in here and making the statement in connection with the matter in which you were arrested some months ago? A. Yes.

"Q. And they have advised you to make this statement? 3189
A. Yes, sir.

"Q. You are making it voluntarily? A. Yes, sir.

"Q. You understand that anything you might say might later be used against you in a criminal proceeding? A. Yes, sir."

Both of those exhibits—the evidence clearly shows that those statements were made in the presence of Mr. Keenan and Mr. Levy, counsel for the defendants Bayer. And the

statements show on their face what I have just read to you, that they were made after consultation with their attorneys.

Now, on behalf of Radovich, on the other hand, it is claimed that his admissions were made under duress. Now, on that matter, again let us have a very careful look at the record. The statement of Radovich, in evidence, before you was made in March of this year in this building. The uncontradicted testimony of Agent Flynn is that Radovich came in at Flynn's request, that the writing out of the statement was begun on the 15th day of March, some time in the afternoon, that it was not completed that
3191 day and that the agent suggested that Radovich come back the following day, March 16th, to complete it; that Radovich stated that he had some other business to attend to on March 16th and he said he would come back on the 17th, and he did come back. And on that day the taking of the statement was completed. It was read by Radovich, he put his initials on each page except the last page, on which he signed his [redacted] name; he did that in the presence of Agent Flynn and [redacted]ent McCabe.

The statement itself recites that it was made voluntarily, with full knowledge of the fact that it could be used against him in any criminal proceeding——

Mr. Robb: If your Honor please, I hate very much to interrupt Mr. McGohey, but the statement doesn't show —it doesn't say that it could be used against the defendant
3192 Radovich.

The Court: You had mentioned that in your argument. I don't think it is proper to repeat.

Mr. Robb: Mr. McGohey says——

The Court: All right.

Mr. McGohey: I am going to read from the statement:

"I, Major Walter V. Radovich, Air Corps, serial number 0416891, make the following supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have

identified themselves to me and whom I know to be special agents of the Federal Bureau of Investigation. No threats of force, promises of favors or duress of any type has been offered to me, to induce me to make this statement, and I know that anything I may say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so."

The uncontradicted testimony of Agent Flynn is that during the taking of the statement from Radovich on March 15th and March 17th this year, both he and Radovich referred to and read from a prior statement which Radovich had given to Flynn and Agent Brown some time about the 5th or 6th of September, 1944, in the hospital at Mitchel Field. 3194 Flynn's testimony is that the September statement was gotten out and looked at at the suggestion of Major Radovich. You will find that testimony in volume H, page 147.

It is now contended on behalf of Radovich that the statement given by him in September, when he was in the hospital, was an involuntary statement by reason of the circumstances of his confinement. It is further contended that the statement given by Radovich in March is also involuntary by reason of the fact that he was shown the September statement at the time he made the March statement and that they are substantially alike.

Now, let us consider these contentions. You remember Mr. Pender, the man who was the attendant at the hospital, 3195 and according to the testimony of Pender, who was Radovich's attendant in ward 15, Radovich did not exhibit any evidence of mental sickness or insanity. You will remember also Detective Kelly, the man who was the provost marshal guard, who had been a sergeant and who is now a detective in the Nassau County Police; Detective Kelly testified that he was the man who used to take Radovich out for his walks. He testified that Radovich exhibited no evidence of insanity or mental illness to him. The evi-

dence produced by the defense further shows, and this is very important in view of the argument that you heard this morning, their own evidence clearly shows that Radovich was not at that time, while he was in that hospital, a man that was being pushed around or given any third degree treatment.

Mr. Keenan: Just a moment. We want to object to that, your Honor. Counsel for the Government has stated "evidence presented by the defense", and I ask him now to correct that.

Mr. McGohey: I will correct that to say, "evidence produced on behalf of the defendant Radovich."

3197 Mr. Keenan: That is correct.

The Court: All right, go ahead.

Mr. McGohey: You heard Mr. Robb this morning, and General Ansell, after him, talk about this terrible, cruel third degree, much more vicious than the hose beating and the kicking. Well, let us look into that. You remember Kelly's testimony, that the afternoon that he came over there and found the two civilians who turned out to be or who were, in fact, the FBI agents; he says that about that time somebody walked in to Radovich with an order, that Radovich was dressed, you remember—he had gotten into his uniform; he was wearing his decorations—and somebody came in and they handed Radovich an order and he looked at it and he read it, and it was an order which purported to direct him to remove his decorations from his
3198 breast and required him to endorse it on the bottom so that there would be proof that he had seen it. And what did this man that was being third degreed do? He handed it back to the messenger and he said, "I will not take off these decorations—" I can imagine that he probably got very angry about it, and he said, "I won these decorations and I am not going to take them off." And he didn't take them off and he didn't sign the order.

Do you think, ladies and gentlemen, that this young lad, under arrest by the Army, who had been in there long enough to know that the Army has a strong discipline, do you think a lad who would defy an order of that kind was then going to be pushed around by a couple of civilians? You just think about that when you are thinking about this statement of the third degree. Radovich was not third degreed.

And, furthermore, there is evidence in here that Radovich knew precisely what his rights were, not only this business about the decorations, but you will remember that Kelly said he complained to him because he was not able to see counsel, and he told him there was a man on that post 3200
by the name of Bradspies that he wanted to see, and Kelly says he told his superior and that his superior made the arrangement. And Kelly says that Bradspies came to see Radovich and saw Radovich prior to the time that Radovich gave his statement to the FBI agents in the hospital at Mitchel Field.

Now, in view of all that evidence there can't be any doubt whatever that the statement that Radovich gave to the agents in September at the hospital was a completely volumtary statement. There is no basis whatever for assuming that this man who flaunted and defied the order of the Army to remove his decorations would meekly submit and make damaging statements against his own interest to two civilians.

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Now, further looking into the record, it discloses that at the end of September at least Radovich was free from the confinement of the hospital and he had the full freedom of the Mitchel Field base, the entire base, except for the Officers' Club. It shows that he had full access to telephone and telegraph so that he could have consulted any counsel of his own choosing any place in the United States.

It further shows that on January 2nd of this year, almost two months before he came in and gave this statement,

which is in evidence, he was completely free from all restrictions except those which any soldier is normally subjected to. There is no testimony whatever that Radovich in March when he gave the statement which is in evidence made any claim to the agents or to anyone else that the September statement had been forced from him. You won't find that any place in that March statement. And there is no testimony that he ever said that. You will find no testimony that he was under duress whatever at the time he made the March statement. And you won't find any testimony whatever that shows that the statements that Radovich made in March were in any wise different from
3203 those he made in September. As to the essential facts regarding the arrangements for the transfers of these boys, the actual transfers, the payments of the money, all of the statements by the Bayers and by Radovich are in substantial agreement and all of them are strongly corroborated by the mass of independent testimony on these points.

Now we come to the claim, ladies and gentlemen, which is not unusual, by persons who have paid money for favors that the payments were involuntary and the product of extortion. The charge here is that the defendants conspired to defraud the United States of its right to the honest services of Army officers and particularly the honest, unbiased services of the defendant Major Radovich. A conspiracy, a plan and purpose to defraud the Government of the honest services of its officials and particularly
3204 of Radovich is a crime, and if in the execution of that scheme the Bayers exposed themselves to Radovich's greed, that is immaterial; that only demonstrates that other crimes were committed in the furtherance of this illegal conspiracy here charged and on trial before you. It is a very common occurrence for a series of illegal acts to be committed in carrying out the illegal conspiracy. One wrongful act does not excuse another. It is no defense to the

crime charged here against the Bayers that they became the victims of greed after their plan and purpose became known to those who were willing to capitalize it.

But let us examine this claim of extortion on the assumption that perhaps it might have some bearing; just let us see whether there is any extortion. Now, in order to give credence to this claim of extortion you would have to disregard the evidence of Colonel Vidal, of Colonel Jacobson, of Captain Kogan, of Major Saffron and of Joseph Bush. Those five witnesses, each one of those witnesses unmistakably testified that Sam Bayer pleaded and begged these officers to help him secure the result which Radovich ultimately accomplished. He pleaded with all to help 3206
him get the boys out of those airborne engineer units. Each of the officers advised against interfering with the movements of the boys. Now, I think it is a fair observation to state that the payments to Radovich by Sam Bayer at least were consistent with the assertion by Bayer, testified to by Major Saffron, that he would do anything in his power to keep the boys from being shipped overseas.

Now, look at the Bayers' conduct. Is their conduct throughout the entire period of the year 1943, from the beginning right up to August, 1944, consistent with extortion, or is it rather clearly the conduct of men desperately determined to accomplish a purpose, looking only for someone to help them and giving every evidence of their willingness and their ability to pay for help? Is their conduct 3207
in August, 1944, when they lied to Colonel Snyder and ran to the Busches to change the records consistent with the victims of extortion? Or, rather, was it the conduct of men driven by their own sense of guilt and their fear of detection? Victims of extortion, ladies and gentlemen, don't go around destroying evidence against their oppressors. And remember that when you think about the changed record. Isn't it perfectly clear to you ladies and gentlemen that.

the claim of extortion was never raised until the investigation began to close about the Bayers? I tell you, ladies and gentlemen, I don't believe there was any extortion.

But it may be that the Bayers paid more than they anticipated paying; perhaps they thought, and maybe they had a right to believe, that after all the lavish entertainment and the gifts they had given to Major Radovich, Radovich might have been a little less exorbitant in the price that he asked; but can there be any doubt that the payments were made for favors which the Bayers avidly and avariciously sought? Can there be any doubt that the Bayers sought to obtain and were willing to pay for and
3209 did pay for favors, for considerations to which they were not legally entitled?

It has been suggested to you that in entertaining and giving gifts to the various officers the Bayers were only expressing normal generosity and gratitude which all Americans feel toward men in the service. Well, let us look at the record on that. You won't find any place any entertainment of anybody except an officer in an outfit where these boys were stationed, and an officer that was able to help them in the role of officers, and outside of Kogan they are all in the First Fighter Command. Were there any enlisted men entertained? Was there any expression of bounty to anybody except somebody that could help with the transfers?

3210 In the light of all this, can there be any doubt in your mind that the Bayers were willing to and did resort to corruption to attain their ends? Before I leave this subject of corruption I would like to recall to your mind what I asked you to remember earlier, namely, those two dates in November, 1943, the 22nd of November and the 24th of November.

You will remember that the evidence shows that the orders transferring the boys out of the airborne engineers to the First Commando unit, that is, to the First Air Commando unit——

Pardon me, your Honor, how much more time do I have?

The Court: You have twenty minutes at your disposal.

Mr. McGohey: You will remember that the evidence shows that those orders getting out of the Airborne Engineers into the Air Commandos down at Goldsboro were requested by Radovich and actually issued on November 22nd, and you will remember also that the orders transferring them out of the Air Commandos and into the Air Transport Command were requested by Major Radovich two days later, namely, the 24th. That is the uncontradicted testimony of Miss Goertz, the young lady from Washington.

Now, Sam Bayer says in his statement that he first 3212
learned of the transfer of the boys from the Airborne Engineers through a telephone call from his son Martin who told him that he was leaving that day from up in New England to go to Goldsboro. On the same day, according to Sam Bayer's statement, that very same date that he received the telephone call from young Martin he met Radovich at Cavanaugh's restaurant in the company of Miss Solomon and that there, at that meeting, in Cavanaugh's in the presence of Miss Solomon for the first time Radovich told him that unless he paid $5,000, that unless he, Radovich, got $5,000 from Bayer he, Radovich, was going to take the boys with him to Burma on a dangerous mission.

Now you will recall that neither Sam Bayer in his state- 3213
ment nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone

call which informed Sam Bayer of the transfer is definitely fixed, and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.

So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit
3215 and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.

Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro.
3216 Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very

little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

But these facts stand out. The Bayers wanted the boys transferred out of the outfits at Westover Field. Read the testimony of Jacobson, Vidal, Kogan and the rest of them on that point. The boys were transferred out of these outfits. Radovich is the one who had them transferred out. Bayer paid $5,000, Radovich got $5,000. 3218
And, of course, you will not forget that previously Radovich approved the transfer out of the First Fighter Command to the Medical Detachment, at which time Sam Bayer paid approximately $2,000 and Radovich got $2,000. So, altogether, from the beginning to the end, Bayer paid $7,000, Radovich got $7,000.

All of the evidence in this case, ladies and gentlemen, demonstrates beyond a reasonable doubt the guilt of these defendants on trial. There is no possible view of the evidence consistent with the innocence of any one of these defendants. There is no verdict which can be justified in reason except a verdict of guilty as to each of the defendants here on trial.

I thank you very much for your patience. I hope I have not tired you too much at this late hour in the afternoon. 3219
Thank you.

The Court: Ladies and gentlemen, I wanted to add my thanks for your patient and attentive attention to all the summations as they have been completed during the day, and it is not any later than I thought this morning. You have heard everyone whom you are required to hear except me. You will be required to hear from me tomorrow morning my charge and giving you the law of the case

which will govern you in your determination of it. Then the case will be submitted to you for your decision.

I repeat my admonition—don't undertake to decide it or discuss it, particularly not to discuss it with anyone else at this late date. It will be given to you for your decision tomorrow morning.

Does it inconvenience any of you to come down at 10 o'clock?

All right. I much prefer that you have ample time to consider.

So adjourn court now until 10 tomorrow morning.

(Adjourned to October 23, 1946; 10 A. M.)

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(The following are the Government's requests to charge.)

The Government respectfully requests the Court to charge as follows:

1. "It is not necessary for the Government to prove the guilt of the defendants or any of them beyond a possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. The reason would be that in this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such
3222 that in a criminal case it is enough if proved that the defendant's guilt be established beyond a reasonable doubt—not beyond all possible doubt."

2. By the term "reasonable doubt" is meant not a capricious doubt, nor every doubt which may flit through your minds in considering this case, but a substantial doubt —a doubt that you can give a reason for if the court called on you to give one.

3. A reasonable doubt of the guilt of the defendants is a doubt based on reason and which is reasonable in view of all the evidence; an honest, substantial misgiving, generated by insufficiency of proof. It is not a capricious or fanciful doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony, nor is it a doubt born of a merciful inclination to permit the defendants to escape conviction, or prompted by sympathy for them or those connected with them. Neither can you create sources of doubt by resorting to matters outside the evidence.

4. The term "reasonable doubt" means a doubt for which a good reason can be given in the light of all the evidence. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all of the evidence presented. 3224

5. While the accused, at the beginning of the trial, are presumed to be innocent, yet, whenever proof shows beyond a reasonable doubt their guilt, then the presumption of innocence disappears from the case.

6. Where two or more act together to accomplish something unlawful, a conspiracy is shown, even though there be no direct evidence of an express agreement. In short, a mutual implied understanding is sufficient, so far as proof of a combination is concerned. The agreement is generally a matter of inference deducted from acts of the persons accused done in pursuance of an apparent criminal purpose. 3225

7. It is not necessary that all of the conspirators be acquainted, one with another. It may be that they have not

been previously associated together. One conspirator may only know a few of the others, but, where one who knows that others are acting together to violate the law, intentionally cooperates to further the object of the conspiracy, he becomes a party to it.

8. When men enter into an agreement or conspiracy to accomplish an unlawful end, they become agents for one another and the act of one in pursuance of the common purpose is deemed to be the act of all and to make all responsible for that act.

3227 9. "In determining whether or not a conspiracy existed in a case like the present, you are not to judge the character and effect of the conspiracy by dismembering it and viewing its separate parts, but only by looking at it as a whole."

10. "I do not mean to require of you a finding that all these parties at any one time should meet together and form an express agreement. * * * Of course, I suppose that when men in fact enter into a plan of that character they do not expressly agree. Much is left to unexpressed understanding and it is not necessary that there should have been any moment in which all met and with any formal expression of words agreed upon a plan."

3228 11. And for a conspiracy to defraud the United States, the act to be done need not be a violation of any criminal statute.

12. It is immaterial who originated the conspiracy and if you find that in fact there was a conspiracy and that any defendant joined the conspiracy at its inception or at any time thereafter it is then your duty to convict. All who participate in any phase of the conspiracy with guilty knowledge thereof are liable.

13. If the parties act together to accomplish something unlawful, a conspiracy is shown, even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. They may not have previously associated together. One defendant may know but one other member of the conspiracy, but if knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

14. The indictment in this case charges the defendants with conspiring, among other thing, "to defraud the United States." To defraud the United States does not necessarily mean to do the United States a pecuniary injury. 3230

"It is well settled that these words are broad enough to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of the government."

15. Defrauding the United States is a term which is not limited to thought of the definitions upon property right, but is broad enough to include any act which interferes with or hampers the United States in the successful prosecution of any policy established by law notwithstanding the fact that the United States lost thereby not a dollar in value or otherwise.

16. A conspiracy having as its object the impairing, obstructing or defeating of the lawful function of any department of the Government by deceit, craft, trickery, misrepresentation or chicanery is within the purview of the statute. In such a case it is not necessary for the Government to allege or prove any direct financial loss to the United States. 3231

17. It is not necessary that the conspiracy should originate with the person charged. Everyone coming into a

conspiracy at any stage of the conspiracy with knowledge of its existence is regarded in law as a party to all the acts done by any of the parties before or afterwards in furtherance of a common design.

18. It is not necessary to conviction that all conspirators should join in the overt act; for the act of one done in furtherance of the conspiracy becomes the act of all.

19. While the overt act done to effect the object of the conspiracy is essential to render a conspiracy punishable, yet such act need not be a criminal act, much less an act
3233 constituting the crime that is the object of the conspiracy. That is, the overt acts in execution or furtherance of the conspiracy may be criminal or innocent.

20. All overt acts charged in the indictment need not be proved to sustain a conviction. If any one be proved beyond a reasonable doubt, it is sufficient to make out the offense.

21. "Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. This is legal evidence, and a jury must act upon it as if it were direct, when it is satisfactory beyond a reasonable doubt."

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22. The evidence of previous good character which was adduced at the trial in behalf of the defendants is not of itself sufficient to create a reasonable doubt in your minds as to their guilt. You are instructed to consider such evidence of good character together with all the other facts in evidence brought out at the trial in determining their guilt or innocence.

23. If the jury believes the defendants guilty beyond a reasonable doubt, no previous good character however proved would be any excuse for acquitting them.

24. If any defendants testify in their own behalf: You should specially look to the interest which the respective witnesses have in the case or in its result. Where the witness has a direct personal interest in the result of the case, the temptation is strong to color, pervert or withhold the facts. The law permits a defendant at his own request to testify in his own behalf. The defendants' testimony is before you and you must determine how far it is credible. The deep personal interest which every 3236
defendant may have in the result of the case should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

25. The law permits a defendant at his own request to testify in his own behalf. The testimony of the individual defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant may have in the result of the suit should be considered by the jury in weighing his innocence and in determining how far or to what extent, if at all, it is worthy of credit.

26. "You are instructed that interest creates a motive 3237
for false testimony; that the greater the interest the stronger is the temptation and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony * * *. The peculiar and deep inteerst which the defendant has in the result of the trial is a mat-

ter affecting his credibility and (is) to be carefully considered by them (the jury)."

27. The indictment contains one count. It is charged that beginning September 1, 1942, and continuing thereafter until the filing of the indictment in July, 1945, in the Southern District of New York, the defendants unlawfully and knowingly conspired and agreed to defraud the United States of its right to the honest and conscientious services of officers of the United States Army. The indictment alleges that it was the aim and object of the conspiracy, among others, to prevent the assignment of
3239 Martin Bayer and Melvin Usdan to a combat unit and, in addition, to prevent the assignment of said men to a unit of the United States Army alerted for overseas duty; it further alleges that towards the ends aforesaid, various gifts and payments were made to various officers of the United States Army stationed at Mitchel Field and more particularly, that the defendants Elias Bayer and Samuel Bayer or either of them paid to the defendant Walter V. Radovich, an officer, to wit, a major of the United States Army, at various times sums aggregating $7,000.

28. The statute under which this charge is made is Title 18, United States Code, Section 88, and the essential elements of the offense are:

3240 (a) two or more persons.

(b) conspire.

(c) to defraud the United States in any manner or for any purpose.

(d) and one or more of the parties do any act to effect the object of the conspiracy.

29. The provisions of the said statute are designed to protect the Government in its rights, privileges, operations and functions against fraudulent operations.

30. The Government means to safeguard itself against being defrauded out of its right to administer an intelligent and honest service of the departments and officers of the United States in the interest of the people and thus if you find beyond a reasonable doubt that the object of this agreement or conspiracy was to defraud the Government of that right by deception or artifice, or if you find beyond a reasonable doubt that this obstructed or interfered with the operations of the Government department, then you will find that the Government was defrauded. 3242

31. The statute under which this indictment is drawn is broad enough to include in its terms any conspiracy for the purpose of impairing, obstructing or defrauding the lawful function of any department of Government. If you find that any conspiracy or agreement existed which was calculated to obstruct or impair the fair, honest and efficient deployment and assignment of military personnel from and to units of the United States Army, that would constitute defrauding the United States.

32. "The word 'fraud' is not limited to the thought of the deprivation of money or property by the acts of wile or deceit, or to depredations upon property rights, but is broad enough to include any act which interferes with or hampers the United States in the successful prosecution of any policy established by law." 3243

33. "The duty is upon you; in considering this statute, to have in mind the object of government in respect to a statute of this kind, as you would have in mind the

object of a statute directing itself against wrongs destructive of individual property rights. The chief aim of government being that of protection and service, it may safeguard itself against conspiracies or combinations, or acts intended to impair its proper administration, or conspiracies to impair any of the functions of the government. It may declare it unlawful to combine for the purpose of doing any act which obstructs or interferes with the operations of government or any of its departments. The government may unquestionably safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the
3245 people."

34. If upon the evidence presented you find beyond a reasonable doubt that the defendants or any two of them conspired to defraud the United States of its right to the honest and conscientious services of Major Radovich or any other Army officer, and if you further find beyond a reasonable doubt that towards that end payments of money were made, then I charge you that whether the payments followed demands therefor or whether the payments followed offers thereof is immaterial.

35. If the jury find any witness has testified falsely concerning any material portion of his testimony, you must disregard that part of his testimony and you may
3246 disregard his entire testimony.

36. If you find that a defendant manufactured, suppressed, secreted or altered evidence, such as books of account or other records, you may consider that fact as evidence of a guilty knowledge or consciousness of guilt.

37. False contradictory statements by any defendant about the material circumstances of the crime with which

he is charged are badges of guilt and may be accepted as evidence of guilt of such defendant.

38. The sole question before you is whether the defendants named in the indictment are guilty of the charge therein laid against them. Your only task is to determine whether they or any of them are guilty as charged. You have no concern with the guilt of any person or persons not named in the indictment and not defendants in the trial which has just drawn to a close. If the evidence or any circumstances surrounding the presentation points to the guilt of any person or persons not named in the indictment and not on trial before you, you are in no sense 3248
to consider such evidence or such circumstances except in so far as it bears upon the question of the guilt of the defendants or any of them.

39. You are instructed that the question of possible punishment of the defendants or any of them in the event of conviction is no concern of the jury, and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendants solely upon the basis of such evidence. Under your oaths as jurors you cannot allow a consideration of the punishment which may be inflicted upon the 3249
defendants, if he is convicted, to influence your verdict in any way.

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DEFENDANTS BAYERS' REQUESTS TO CHARGE.

1. INDICTMENT. An indictment is nothing more or less than an accusation in writing. It is the instrumentality whereby a criminal action is instituted. The fact that a grand jury has returned an indictment against a man is not to be considered as evidence of the man's guilt. On the contrary, the defendants are presumed to be innocent of the accusation alleged against them in the indictment and you are hereby charged, as a matter of law, that it is your duty to presume the defendants to be innocent of the charge made against them unless and until you are satisfied of their guilt by the evidence adduced in support
3251 of the indictment, beyond a reasonable doubt.

2. PRESUMPTION OF INNOCENCE. Every person charged with a criminal act by law is presumed to be innocent of that charge and throughout your deliberations, and until such time as you are convinced, beyond a reasonable doubt to the contrary, the defendants are entitled to this presumption of innocence.

3. This presumption of innocence, under the American system of jurisprudence, is a substantial part of our law and follows the defendants not only when the indictment is returned, but stays with the defendants throughout the entire case, and must not be cast aside by the jury through passion or prejudice. This presumption of inno-
3252 cence, which clothes every person accused of crime, imposes upon the Government the burden of establishing the guilt of a person accused not by a mere preponderance of evidence, as in civil cases, but beyond a reasonable doubt. You are required, therefore, to give careful and weighty consideration to the presumption that the defendants here on trial are innocent of the accusation made by the Government against them and if, after a consideration of the evidence in this case, you have any reasonable doubt

as to the guilt of the defendants, it is your duty to acquit them. You must exercise the utmost caution and care in considering the evidence here, lest you unjustly convict an innocent man.

4. BURDEN OF PROOF. The burden of proof is on the prosecution. The prosecution has the burden of establishing every fact and circumstance essential to the guilt of the accused. Each fact and each such circumstance must be proved beyond a reasonable doubt before a verdict of guilty can be arrived at.

5. If the Government fails to establish each and every 3254
fact material and essential to the guilt of the accused, either because there is no testimony supporting such element, or because the testimony in support thereof does not satisfy you beyond all reasonable doubt of the truth, then it is your duty to acquit the accused for the reason that the Government has failed to establish their guilt. The burden on the part of the Government to prove every element of the crime charged, beyond a reasonable doubt, never shifts but always remains with the Government throughout the trial.

6. The law does not require, and the defendants are not called upon to prove that they are innocent of the accusation made against them, as their innocence is conclusively presumed, until the contrary is established beyond 3255
a reasonable doubt.

7. The fact that the defendants did not take the stand cannot in anywise be charged or urged against such defendants; and you are to draw no inference whatever from the fact that the defendants have not taken the stand in this case. I charge you, as a matter of law, that the defendants are entitled to rely upon the judgment of their

counsel that the Government has made out no case calling for any explanation or testimony on their parts, or in the alternative the judgment of their counsel that such explanation as has already been furnished in answer to the questions propounded to the defendants by the Assistant United States Attorney and now in evidence obviated the necessity of their giving further testimony on this subject.

8. You must bear in mind that the law does not require a defendant in a criminal case to prove himself innocent of the charge made against him by the Government and that the Government has the burden of proving the de-
3257 fendants guilty, beyond a reasonable doubt, in the manner and form charged in the indictment, to the satisfaction of the jury, and unless the prosecution has done so, it is the duty of the jury to find the defendants not guilty and to acquit them of the charge made in the indictment.

9. REASONABLE DOUBT. The term "reasonable doubt" means a doubt of such quality which, were it to arise in your private lives in connection with some important decision required to be made by you, would cause you to pause, hesitate and ponder in that decision. So, if when all the facts in evidence in this case have been considered by you, and you are not abidingly persuaded and convinced, to a moral certainty in your conscience that the defendants are guilty, you have a reasonable doubt.

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10. After a consideration of the evidence in this case, if you feel that the facts established by the Government are as consistent with innocence as they are with guilt, it is your duty to render a verdict of not guilty and acquit these defendants, for you may not base a verdict of guilty upon the evidence in this case unless the facts proven by the prosecution exclude, to your complete satisfaction, every other hypothesis but that of guilt.

11. And where the facts or circumstances proven by the Government are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though the inference pointing to guilt may be equally weighty.

12. You are charged, as a matter of law, upon the evidence of this case, that unless the hypothesis of guilt flows freely and naturally from the facts proven and unless all such facts are consistent only with guilt, such evidence does not warrant a conviction and if the evidence in this case is reconcilable with the conclusion of innocence, as well as a conclusion of guilt in your minds, I direct you, as a matter 3260
of law, that it is your duty to reconcile the facts with innocence, and you must therefore find the defendants not guilty of the crime charged and acquit them.

13. In considering the evidence offered by the Government in this case, you must always bear in mind that the Government has the duty of establishing each fact and each circumstance essential to the commission of the crime of which the defendants are accused, beyond any reasonable doubt.

14. So, if in your opinion, the evidence introduced by the prosecution is only sufficient to raise a conjecture or a suspicion unfavorable to the accused, it is not such evidence as would justify you in rendering a verdict of guilty, and it is 3261
your duty, under such circumstances, which I charge you, as a matter of law, to acquit the defendants.

15. For, in order to convict the defendants, you must satisfy yourselves, beyond a reasonable doubt, that the practices in which they engaged were in furtherance of a scheme, which they wilfully, knowingly and intentionally conceived and devised, in the very first instance, and at the very outset, with criminal intent and purpose.

16. In this connection, I charge you, as a matter of law, that fraud is never presumed. On the contrary, the presumption in law is that parties, in their business relations, are prompted by honest motives, and this presumption is so well established in law that before you are justified in abandoning that theory of the conduct of the defendants in this case, you must be satisfied, beyond a reasonable doubt, and not by mere conjecture or suspicion, that the defendants intentionally, wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent.

3263 17. And unless you find, beyond a reasonable doubt, that the defendants did not act in good faith, it is your duty to acquit them.

18. And in determining the guilt or innocence of the defendants, you must consider whether or not they acted in good faith, for good faith in a case such as this, is a complete defense.

19. CONSPIRACY. The essentials of a conspiracy in a criminal prosecution may be defined as a confederation between two or more persons, to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means.

20. In other words, to constitute a conspiracy, the pur-
3264 pose to be effected by it must be unlawful in its nature, or in the means to be employed for its accomplishment, and to constitute a conspiracy, there must be a confederation of two or more persons; and there must be a unity of design and purpose, for the common design is the essence of the conspiracy.

21. The confederating together is so necessary, as a constituent element of the crime, that several persons may,

simultaneously, actually do, without incurring liability to punishment, that which, if it were the object of a preconcerted design, although not done or attempted, would render the participants liable to indictment for conspiracy; nor will evidence, that each of several defendants acted illegally or maliciously, with the same end in view, support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.

22. The mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute on a party to a conspiracy. There must be intentional participation in the transaction, with 3266 a view toward the furtherance of the common design and purpose.

23. Conspiracy implies concert of design and not participation in every detail of execution. The formation of a common design, by two or more persons, is not of itself a criminal conspiracy. Confederation must be corrupt. If the motives of the confederates are not corrupt, no criminality can attach to the confederation.

24. Guilty knowledge of the act done by the confederation is a necessary element, without proof of which there can be no conviction, it being necessary for the Government to show that each of the conspirators had guilty knowledge, no matter how, when or where acquired. 3267

25. WEIGHING THE EVIDENCE. I charge you, as a matter of law, that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is your duty to find the defendants not guilty of the charge here made, and you must accordingly acquit them.

26. In determining the credibility of the witnesses who have testified at this trial, you must not allow yourselves

to be persuaded to credence by the fact that any particular witness testified at the instance of the prosecution, for Government witnesses are not entitled to any more credence than other witnesses, and if you believe that any witness who has testified at this trial has testified falsely, in any phase of his examination, whether on direct examination by the Government or on cross-examination conducted at the instance of the defendants' counsel, you are authorized, and it is your privilege, to reject all of the testimony of such a witness.

27. You are not to be persuaded in your consideration
3269 of the evidence in this case by the fact that the Government of the United States is a party to this action, and I charge you, as a matter of law, that the Government is to be considered as any other party, and its counsel as any other counsel for any other party.

28. In your deliberations, you must adhere strictly to the following rules, which I charge you upon your oaths, as a matter of law:

(a) You must consider only the evidence in this case;

(b) You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial;

3270 (c) You must disregard all arguments of counsel, addressed to the Court, upon questions of law, or upon motions for the admission or exclusion of evidence, as well as the rulings of the Court upon such matters, whether in favor of the Government or in favor of the defendants;

(d) You must disregard any suggestion which may have been conveyed in your mind by any question

which was not allowed, as well as any suggestions which may have been conveyed to your minds by things not in evidence;

(e) You are not to construe the denial by the Court of any motions made to dismiss this indictment, as such a ruling is not to be considered by you as any indication of the guilt or innocence of the defendants;

(f) You must not be influenced by anything which the Court has said or done, which may have given you an impression as to any opinion entertained by the Court upon the facts, as you are the sole judges of the facts to the precise extent that the Court is the judge of the law; 3272

(g) You must not indulge in speculation, nor pursue possibilities or probabilities, as you are required upon your oaths to render a decision, solely upon the evidence;

(h) You must render a verdict representing your real opinion and judgment;

(i) While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise. 3273

(j) In your consideration of the evidence in this case, you must always bear in mind the fact that you are justified in assuming that the defendants are innocent of the crime imputed to them by charges con-

tained in the indictment, and until the Government has convinced you, beyond any reasonable doubt, of the guilt of the defendants, you, and each of you, must continue to regard the defendants as innocent of the crime of which they are charged;

(k) I charge you, as a matter of law, that you must not permit atmosphere to displace evidence, and that you must not permit passion and prejudice to enter into your consideration of the evidence in this case;

(l) I admonish you, upon your oaths, to be ever vigilant to reject innuendoes which may have been conveyed to you, during the trial of this case, and to decide the same honestly and justly, according to your oaths and to render a true and just verdict, according to your conscience.

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29. I charge you that in the opening statement in setting forth the Government's theory of the prosecution, the United States Attorney stated that evidence would be presented to you, that arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the Headquarters of the Base to the Headquarters of the First Fighter Command, the Headquarters Squadron of which Major Radovich was the Commander; there is no evidence in the case to prove this statement made by the United States Attorney and, therefore, you will conclude that the Government has failed to prove that part of its case.

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30. I charge you that the Government's theory of this offense is that the conspiracy claimed to have been entered into by the defendants provided for the transfer or an attempt to transfer the enlisted men, Martin Bayer and Melvin Usdan, from an outfit or organization alerted for

overseas service and unless you find beyond a reasonable doubt that at the time of their transfer from Mitchel Field or Westover or Bradley Fields, the said enlisted men were in such outfit or organization alerted for overseas service then your verdict must be not guilty.

31. I instruct you that the defendants are entitled to have this Court charge to you their theory of defense against the charges set forth in this indictment and I, therefore, charge you that the defendants Samuel Bayer and Elias Bayer assert as their defense that they at no time attempted to induce any officer of the United States to do any act in violation of the said officers' obligations 3278
and duties to the United States and that any gratuities other than sums of money were extended to any officers for no motive and without in any manner being a part of an agreement or plan or combination or conspiracy to induce any officer to in any manner be unfaithful to his obligations to the United States Government and that any payments of money made by him to the defendant Radovich were made involuntarily through coercion, expressed or implied, and I charge you that in the event that you do not find to the contrary, beyond a reasonable doubt, your verdict must be in favor of Samuel Bayer and Elias Bayer.

32. I charge you that the uncontradicted evidence in this case, from government witnesses, establishes the fact that regulations require that the first three months of a 3279
man's service be devoted entirely to basic training. I charge you that the undisputed evidence in this case shows that neither of the two enlisted men, Bayer or Usdan, received more than two weeks' basic training and a failure to provide such basic training for the said enlisted men would constitute a violation of the Army regulations and, therefore, any officer who for any other purpose, prevents the shipment overseas of enlisted men, including Martin Bayer,

and Melvin Usdan, who did not receive the required amount of basic training, would not be found by you on such account to be unfaithful in the performance of his duties as such officer, nor would any agreement or plan or conspiracy to prevent such individuals from being shipped overseas or being retained in camp until such basic training had been received, as provided for by regulation, would not constitute defrauding the United States government and would, therefore, not constitute the basis of an offense against the United States. (See testimony Capt. Pepper, page 114, October 4, 1945 and testimony of Melvin Usdan and testimony of Colonel Boebel.)

3281 33. I charge you that the theory of the defense is that the enlisted men, Martin Bayer and Melvin Usdan were not properly or adequately trained to justify their being shipped overseas. I charge you that the defense theory is that the two enlisted men were being shipped to a commando unit for which they were not properly trained and I charge you that the undisputed evidence in this case shows that to be a fact and, therefore, any effort on the part of Samuel Bayer to prevent such action against his son and nephew, even by the payment of money, would not constitute defrauding the United States.

34. I charge you that the evidence shows that the commando unit was a voluntary organization and that any
3282 payment of any money for the purpose of preventing the transfer of either enlisted man or both to said organization to which they had not consented to be transferred or any agreement to prevent such transfer without their consent, would not be in fraud of the United States and, therefore, if said transfers were made without the consent of said enlisted men or either of them and I charge you that all the evidence herein shows that they did not so consent, I therefore, charge you that you cannot find that the gov-

ernment was defrauded by reason of their being transferred from Westover Field and in that respect, you must find the defendants Bayer not guilty.

35. I charge you that the theory of the prosecution is that as a part of the conspiracy, an agreement or arrangement was made between the defendant Radovich and one or more of the defendants Bayer, that Radovich would arrange or cause a transfer from Westover Field of the said enlisted men from outfits alerted for overseas to the commando unit at Goldsboro, which said commando unit being overstaffed or for other reasons, would require that the said enlisted men be transferred therefrom to another 3284
Army group or organization or unit or outfit. I charge you that there is no evidence in proof of this charge or theory of the prosecution excepting that contained in the statement of defendant Radovich, offered by the government, which as I have charged you, in no manner is binding upon either of the defendants Bayer. Therefore, I charge you that you must entirely disregard and consider unproven this theory of the government and that you must, therefore, find that as to said transfers from Westover Field, there was no such conspiracy, as claimed by the government.

36. I charge you that all of the evidence which you may consider against Samuel Bayer shows that any payments of money were made by him pursuant to requests or de- 3285
mands from defendant Radovich and not otherwise and, therefore, you must find as against both Samuel Bayer and Elias Bayer that any moneys paid to defendant Radovich directly or indirectly were not as a result of offers or suggestions of the said Bayers but entirely by reason of the solicitations and threats of the said Radovich.

37. I charge you that the Government has failed to offer any proof that any gratuity offered by the defendants

Bayers or either of them to any officers was at any time coupled with a request or demand for any return therefor.

38. I charge you that the mere fact that the witness Anne Solomon was and is an employee of Samuel Bayer or any company with which he is connected does not create any presumption that she is an interested witness or that her testimony should be more carefully scrutinized on this account.

39. You are instructed that the offense charged consists of an alleged violation of Section 88 of Title 18 of the United States Code and therefore before you can
3287 convict any of the defendants, you must find that such defendants conspired to defraud the United States Government and therefore fraud against the United States Government is the gravamen of the offense and unless you do find that the intent and purpose of the said conspiracy was to actually defraud the United States Government, you must return a verdict of not guilty.

40. You are instructed that this indictment does not charge the offense of bribery of either giving or soliciting a bribe on the part of any defendant in this case. The Federal criminal laws do provide for such offense. Section 207, Title 18, official accepting bribe provides:

3288 "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof • • • shall ask, accept, or receive any money • • • or gratuity • • • with intent to have his decision or action on any question, matter • • • which may by law be brought before him in his official capacity • • • influence thereby, shall be fined not more than three times the amount of money or value

of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States."

This is a statute providing punishment for bribery of a Federal officer but the Government does not charge in its indictment the violation of this Federal criminal statute. Nor does it charge any conspiracy on the part of Samuel or Elias Bayer or Walter V. Radovich to commit this said offense of bribery so defined. 3290

41. You are instructed that Section 91 of Title 18 of the United States Criminal Code provides for the definition of and the punishment of the offense of "Bribery of United States officer." It provides that:

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the 3291
Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in,

or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."

3293 I charge you that none of the defendants herein are charged by the Government with the violation of this Federal criminal statute of bribery of United States officer nor are they herein charged with a conspiracy to commit such offense. I, therefore, charge you that neither bribery nor conspiracy to bribe is before you for your consideration and you should, therefore, disregard such offense entirely in your consideration since, if such crime has been committed, I charge you that there has been ample opportunity, is now and will be in the future, for the Government to prosecute any individuals or officers, including all three defendants for the commission of the offense of bribery or a conspiracy to bribe.

3294 42. You are instructed that since this is a charge of conspiracy, the Government must prove to you beyond a reasonable doubt first, what the agreement of conspiracy was; secondly, by whom it was entered into; and third, in what manner and at what time; and if at the end of your deliberation, you are confused as to the claim of the Government in any of these respects to the extent that it is not clear to you beyond a reasonable doubt why the agreement the Government charges consist of, or by whom it was entered into or when, then, and in such event, it will be your duty to bring in a verdict of not guilty for all three defendants.

43. You are instructed that for you to convict the defendants, it is not sufficient for you to find even beyond a reasonable doubt that some agreement between the defendants did take place or that some conspiracy was entered into but that you must find that the conspiracy so entered into was the precise conspiracy alleged by the Government in the indictment to have occurred and no other, and in the event that you are not liable to so find by clear and convincing proof, leaving you free from reasonable doubt on this subject, you must acquit all defendants.

44. You are instructed that the Government charges a conspiracy on the part of three persons, Samuel Bayer, Elias Bayer and Walter V. Radovich, and unless you do find that there was a conspiracy entered into between all three defendants named herein to defraud the United States Government in the manner and fashion alleged in the indictment, then you must bring in a verdict of acquittal for all three defendants. 3296

45. You are instructed that this indictment does not describe a devisable offense and that unless you find all three defendants to have engaged in this conspiracy and in the identical conspiracy described in the indictment, you must acquit all defendants.

46. You are instructed that it is not your duty to determine whether some wrong has been done to the Government or some crime or offense has been committed. It is your duty herein to determine solely whether or not you are convinced beyond a reasonable doubt that the offense charged in the indictment has been committed and in the event you are unable to so find by clear and convincing proof, your verdict will be for the defendants. 3297

47. You are instructed that such statements of Samuel and Elias Bayer as have been introduced in evidence and read to you can only be considered by you in the event that you find them to have been made by the said defendants or either of them against their interests and without the same being in any manner procured through inducements. In the event that such statements were obtained by inducements of any kind, they are incompetent and must be disregarded by you.

48. I charge you that said statements contain many questions and answers which are totally immaterial to the
3299 issues in this prosecution; that there is no evidence against either of the Bayers that there was any misconduct on their part with reference to any uniforms ordered or purchased by the defendant Radovich from Mervin Levine; that there is no evidence that either the Plymouth Thread and Yarn Company or Samuel Bayer or Elias Bayer paid any money therefor and I, therefore, instruct you to disregard this transaction entirely; that there is no evidence that the defendant Elias Bayer purchased anything for Radovich; that there is no evidence of any violation of the law on the part of Samuel Bayer or Elias Bayer in reference to any conduct with any person at any night club or wrongdoing in accompanying any officers named throughout this trial to any night club.

I charge you that there is no evidence that Elias Bayer
3300 had any knowledge of or any participation in the alteration of any records.

I further charge you that you can disregard anything in the record concerning a Colonel Clarke or Colonel Dykemeyers or Lieutenant John Gimbel, Jr., or Ed A. Martin or Charles Deninberg, all of whose names were used in questions propounded to Elias Bayer by Assistant United States Attorney Wallace without any evidence being introduced in this hearing to in any manner connect or con-

cern any such individuals with any relevant matter in these preceedings and you are, therefore, instructed to disregard such questions and answers and the names of such individuals.

I charge you that you will likewise disergard any questions and answers of the Assistant United States Attorney Wallace concerning Sergeant Gross, Colonel Johnson or Purdem for like reasons.

49. You are instructed that the Government attempted to introduce evidence through questions asked and answered by Elias Bayer about his purchasing insurance. I instruct you that the Government has offered no proof 3302
of any kind whatsoever in respect thereto, and by reason of such failure you will disregard any such questions or any such subject matter in this proceeding.

You are further instructed that Elias Bayer was asked about various individuals including Feldman and Greenfield and that the Government has offered no proof of any matters concerned with such names and, therefore, you will entirely disregard any such questions and answers.

50. You are instructed that no statement made by the defendant Radovich can in any manner or fashion be considered by you in arriving at a conclusion of guilt on the part of Samuel Bayer and if you are not able to carefully and clearly beyond a reasonable doubt separate in your 3303
mind such testimony from any other testimony in this case so that your mind remains unconfused on this subject, you must return a verdict of not guilty as to the defendant Samuel Bayer.

51. I charge you that you have had read to you Exhibits 19 to 22 inclusive, containing a long statement purported to have been made by Elias Bayer in answer to questions propounded by Assistant United States Attor-

ney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Samuel Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Samuel Bayer from those contained in the said statement so that your mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Samuel Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to do so that you are in no manner or fashion influenced in
3305 your conclusion by said statements which I have charged you already are not binding upon Samuel Bayer, then and in that event you must bring in a verdict of not guilty for Samuel Bayer.

52. I charge you that you have had read to you Exhibits 8 to 18 inclusive, containing a long statement purported to have been made by Samuel Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Elias Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Elias Bayer from those contained in the said statement so that your
3306 mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Elias Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to so do so that you are in no manner or fashion influenced in your conclusion by said statements which I have charged you already are not binding upon Elias Bayer, then and in that event you must bring in a verdict of not guilty for Elias Bayer.

53. You are instructed that it is particularly important in a case of this nature to keep clear in your mind who made the alleged admissions contended for by the Government. You have had read to you three statements. None of these statements may in any manner or fashion influence you in determining the guilt of any of the three defendants other than the single defendant whom you find beyond a reasonable doubt to have made the statement you are considering, and it is particularly important that you keep free from confusion on this vital matter and if upon a careful and matured consideration of all of the evidence you are not free from a reasonable doubt that there has been confusion in your mind as to which of the 3308
three defendants made the admission concerning the fact under consideration, then and in such event I charge you that you will have such a doubt as will require you to return a verdict of not guilty as to such defendant.

54. You are instructed that it will not be sufficient for a conviction of any defendant in this case to find even beyond any doubt that money passed from one individual to another. You must also find that such action was the result of a conspiracy to defraud the United States Government and in the event that you fail to so find, particularly if you find that the action sought to be accomplished in any agreement which you find to have taken place would not constitute a fraud against the United States Government, then in such event you will return a verdict of not 3309
guilty for all defendants.

55. You are instructed that the Government cannot be defrauded merely by transferring one soldier from one company or field to another at the request of any individual including such soldier's parents. If you find that if such transfer, if carried out, would not constitute a fraud against the United States Government, then you are instructed

that any such agreement or concerted plan would not be in violation of the laws of the United States and your verdict herein must be one of not guilty for all of the defendants. If such agreement consisted of an understanding that the soldiers, Martin Bayer and Melvin Usdan, would receive the same treatment and consideration as any other soldier, in such event you would not find that the United States was defrauded and your verdict would therefore be not guilty as to all defendants.

You are instructed that before you can find the defendants or any of them guilty as charged in this indictment, you must find beyond a reasonable doubt that there was a
3311 conspiracy to defraud the United States and I further charge you that that of which the United States is intended by said agreement or conspiracy to be deprived of must be something of substance or value and cannot consist of some vague or fanciful or insignificant matter of no practical consideration and trivial in nature.

56. You have received evidence of gratuities extended to and received by various officers of the United States Army. You are instructed that it is well known that such gratuities were habitually offered to and accepted by soldiers and officers of the United States Army throughout the entire period complained of in this indictment and that such facts unless proximately related to unlawful conduct would not in itself constitute any evidence of guilt on the
3312 part of any of the defendants herein and could not in themselves justify a verdict of guilty at your hands.

57. You are instructed that the Government has the burden of proof beyond a reasonable doubt of showing what the conspiracy consisted of and when it was entered into. Such conspiracies need not be entered into formally or in writing or by the employment of any particular phraseology but this does not relieve the Government from its ob-

ligation of proving to you clearly and unequivocally what the agreement was and between whom and by whom it was entered into. This obligation is the same as any other that the Government assumes in any criminal prosecution.

58. You are instructed that "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." And this is especially true where alleged admissions or confessions have been introduced by the Government on the part of each of the three defendants with an admonition that you do not consider any statement contained in any such alleged admission or confession against either of the other two defendants. 3314
You may find this to be a very difficult task and one impossible for you to sustain in good conscience and in the event you do, I charge you to disregard the entire statement and if even then you are unable to be free from reasonable doubt in your mind that you have fulfilled this obligation, then it is your duty in accordance with your oath as a juror to find the defendants not guilty. The obligation with reference to clear and convincing proof beyond a reasonable doubt is one which the law places upon the Government and it is one of the essentials of our safeguards against misfortune of wrongful conviction. You are asked, therefore, to give especial regard and attention to this feature of the prosecution so that unless you are at the termination of all of your consideration in good conscience, free from any reasonable doubt on this subject, you must re- 3315
turn a verdict for the defendants.

59. I charge you that the claim is made by the defendants Bayers that any payments of money were made as the result of duress and threats expressly or impliedly made by Walter Radovich that a failure on the part of Samuel Bayer to pay such money would result in his son, Martin Bayer, being the subject of discrimination in that

he would be sent overseas before the time such action would occur through the normal operation and that he would be taken from the normal channel of operation and transferred immediately to an Air Commando outfit to operate in the Japanese area on a highly dangerous mission and that such demand was tantamount to extortion. I charge you that if you find that any action on the part of Samuel Bayer, including the payment of any money or the causing of the same to be made to Walter Radovich, was brought about through the threats of the said defendant Radovich to use his official position to in any manner discriminate against the fair and impartial treatment of defendant's son, Martin Bayer, in such event you will find the defendants Samuel Bayer and Elias Bayer not guilty of conspiring against the United States Government through making or participating in any manner in such payments.

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60. I charge you that all the evidence shows that Martin Bayer and Melvin Usdan were both soldiers in good standing in the United States Army, free from the need of any disciplinary or out of the ordinary action or treatment as such members of the United States Army, and if you find that the defendant Radovich, as an officer of the United States Army, was attempting to move them from Headquarters, First Fighter Command, to any other part of the Army for the sole reason that any officers at Mitchel Field were the recipients of gratuities that such would have constituted unwarranted, unfair and discriminatory treatment of the said Martin Bayer and Melvin Usdan by the said defendant Radovich as an officer of the United States Army and any effort to prevent the same cannot be found by you to be an attempt or conspiracy on the part of anyone to defraud the United States Government and cannot therefore be the basis for finding the defendants Bayers guilty of the offense charged in this indictment.

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61. You are instructed that the procuring or agreeing to the transfer of a soldier by an officer would not in itself constitute failure on his part to defraud the United States Government of his fair and impartial judgment and conscientious service unless said officer believed that the said transfer was not for the good of the service. I further charge you that before you find an officer has failed to give the United States Government his conscientious and unbiased services and judgment, it must be found first that he is under a duty to exercise judgment or duty in the premises and if you find that the transfer of enlisted men or said enlisted men's movements did not come within the military duties of the said officer, he nor no one else can be found 3320
to have conspired to defraud the Government out of its right to his faithful and conscientious judgment or service and in such event any action upon his part could not be a part of a conspiracy to defraud the Government.

I charge you that under all of the evidence in this case, Major Radovich was not the Commanding Officer of Martin Bayer or Melvin Usdan in November of 1943 and, therefore, he had no obligations to the Government with reference to their movements at said time. I charge you that under all of the evidence in this case no one had a right to order the transfer of Martin Bayer and Melvin Usdan from the Airborne Engineers at Westover Field in November of 1943, and that they could not be required to leave their posts and accept a transfer to the Commando Group at 3321
Goldsboro, North Carolina, and any effort upon the part of Samuel Bayer and Elias Bayer to prevent such transfer to the said Commando outfit cannot be in and of itself the justification for a charge of criminal conduct on their part. Therefore, if you find that the said Martin Bayer and Melvin Usdan were transferred in violation of their rights to the said Commando unit by the action of Major Radovich, without their own consent, then such transfer was unauthorized and improper on the part of Major Radovich and

any effort to bring about a prevention of the same on the part of the defendants Samuel Bayer and Elias Bayer would not constitute a fraud upon the United States Government.

62. I charge you that there is no evidence in this case that the transfers of Martin Bayer and Melvin Usdan from Westover Field to the Commando Unit at Goldsboro was effected in any manner other than that described by Samuel Bayer and Elias Bayer as far as said defendants Bayers are concerned and in considering the Government's charges against the said defendants Samuel and Elias Bayer in regard to such alleged conspiracy, you are obliged to accept
3323 their statements as true in this regard, in which event you will find that Samuel Bayer was the victim of extortion and that his action in regard to the payment of $5,000 to Radovich would not justify your returning a verdict of guilty against him.

63. I charge you that there is no evidence in this case that there was any agreement on the part of any two or more conspirators to conceal or alter any records or books of account or other indications of any irregularities with reference to any uniforms ordered, made or delivered at I. Buss and Company as charged by the Government in this indictment and, therefore, you will disregard the same as in any manner constituting any part of this conspiracy.

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64. You have been charged by me that if any witness has testified falsely concerning any material portion of his testimony, you must disregard that part of his testimony. I charge you that that does not in any manner apply to any of the statements made by defendants Samuel Bayer and Elias Bayer, which are before you for consideration.

65. I charge you that even though you find that a defendant manufactured, suppressed, secreted or altered evidence

such as books of account or other records, you may not consider that fact as evidence of a guilty knowledge or consciousness of guilt if you find that the records so manufactured, suppressed, secreted or altered did concern transactions from which the said defendant was entirely free from wrongful act or motive. In other words, even though you find that Samuel Bayer altered, suppressed or secreted evidence with reference to the uniforms manufactured and delivered by I. Buss and Company; if from all the evidence you are convinced that said delivery of said uniforms to officers of the United States Army was made at the request of the said officers; and that an understanding that the said officers were to pay for the said uniforms and failed to pay 3326 therefor because of dissatisfaction with the same or for any other reason unconnected with Samuel Bayer, and that the mere fact that Samuel Bayer saw fit to pay for the same to his brothers-in-law, who could not afford to sustain the loss, and that such payment was made to avoid the same, without any purpose of corruption or wrongdoing on the part of Samuel Bayer, any conduct on his part thereof with reference to Samuel Bayer would be totally immaterial and should be disregarded by you.

If the jury finds that the facts establish that the defendants Bayer made various gifts to the defendant Radovich for the purpose of obtaining his conscientious, faithful, disinterested and unbiased service and judgment in determining whether to transfer Martin Bayer and Melvin Usdan, both soldiers in the United States Army from units stationed in continental United States to units about to be sent 3327 out of the continental United States, then the defendants Bayers must be acquitted.

If the jury finds that the defendants made various gifts to the defendant Radovich to have the said defendant Radovich perform his lawful duty, then the defendants Bayers must be acquitted.

If you find from the facts that the defendants Bayers made the gifts without the intent to defraud the United States but to obtain the disinterested and unbiased judgment of officers of the United States Army free from corruption, partiality, improper influence, bias, dishonesty and fraud, then you must acquit the defendants Bayers.

The fact that the defendant Radovich did not take the stand to refute the testimony of the defendants Bayers is
3329 a circumstance which may be taken into consideration by the jury in determining the credibility of the evidence as given by said defendants Bayers.

The fact that the defendants Bayers cannot call or compel the defendant Radovich to testify is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of said defendants Bayers.

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REQUESTS TO CHARGE BY DEFENDANT WALTER V. RADOVICH.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| UNITED STATES OF AMERICA<br>v.<br>ELIAS BAYER, SAMUEL BAYER and WALTER V. RADOVICH,<br>Defendants. | Criminal No. 120-468 |

3332

DEFENDANT RADOVICH'S PRAYER NO. 1

You are instructed that the indictment is a mere formal accusation or charge, and is not evidence of guilt. For this reason you must not be influenced in any way by the fact that an indictment was returned against the defendants.

*Nanfita* vs. *United States*, 20 F. (2d) 376;
*Cooper* vs. *United States*, 9 F. (2d) 216.

DEFENDANT RADOVICH'S PRAYER NO. 2

You are instructed that the defendants are presumed to be innocent. You must consider this presumption, that the defendants are innocent, as evidence in their favor, and 3333
unless at the close of the entire case the presumption has been overcome by proof beyond a reasonable doubt that they are guilty, then the defendants must be acquitted.

*Coffin* vs. *United States*, 156 U. S. 432;
*Agnew* vs. *United States*, 165 U. S. 36;
*Shepard* vs. *United States*, 236 F. 73.

3334 *Requests to Charge by Defendant Walter V. Radovich.*

DEFENDANT RADOVICH'S PRAYER NO. 3

You are instructed that a reasonable doubt exists, if after an impartial comparison and consideration of all the evidence, you cannot truthfully say that you have an abiding conviction of the defendants' guilt, a conviction to a moral certainty. And in this connection you are further instructed that it is not sufficient for the Government to establish a probability, even though a strong one, that the defendants are guilty. The evidence must establish the guilt of the defendants to a moral certainty; it must satisfy your judgment as to their guilt, so as to exclude any other
3335 reasonable conclusion. If you can reconcile the evidence with any reasonable theory consistent with the defendants' innocence, you must do so and find the defendants not guilty.

*Shepard* vs. *United States*, 236 Fed. 73;
*Arine* vs. *United States*, 10 F. (2d) 778;
*Agnew* vs. *United States*, 165 U. S. 36.

DEFENDANT RADOVICH'S PRAYER NO. 4

You are instructed that the circumstances of a case may be such that an established reputation for good character, standing alone, will create a reasonable doubt, although without it the other evidence would be convincing.

3336 *Edgington* vs. *United States*, 164 U. S. 361.

DEFENDANT RADOVICH'S PRAYER NO. 5

You are instructed that when the Government relies upon circumstantial evidence to support a verdict of guilty, such evidence must exclude every reasonable conclusion, except the conclusion that the defendant is guilty, and must be inconsistent with every reasonable hypothesis of innocence.

It is not enough that the facts proved make probable the guilt of the accused, but they must exclude every other reasonable conclusion. If there is a reasonable explanation of the facts, which is consistent with the defendant's innocence, then the jury must find the defendant not guilty.

*Ferris* vs. *United States*, 40 F. (2d) 837;
*Philyaw* vs. *United States*, 29 F. (2d) 225;
*Kassin* vs. *United States*, 87 F. (2d) 183;
*Van Gorder* vs. *United States*, 27 F. (2d) 939.

DEFENDANT RADOVICH'S PRAYER NO. 6

3338 You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

*Bram* vs. *United States*, 168 U. S. 532.

DEFENDANT RADOVICH'S PRAYER NO. 6A

3339 You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt

that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

*Bram* vs. *United States*, 168 U. S. 532.

DEFENDANT RADOVICH'S PRAYER NO. 7

You are instructed that the statements claimed to have been made by the defendant Radovich to the government investigators, standing alone, are not sufficient to justify his conviction. Unless you find beyond a reasonable doubt that such statements are corroborated and fortified by sub-
3341 stantial independent evidence, you must find the defendant Radovich not guilty. In this connection, you are further instructed that the burden is upon the government to establish beyond a reasonable doubt that there is such substantial corroborating evidence.

*Tingle* vs. *United States*, 38 F. (2d) 573;
*Forte* vs. *United States*, 94 F. (2d) 236;
*Daeche* vs. *United States*, 250 Fed. 566.

DEFENDANT RADOVICH'S PRAYER NO. 8

You are instructed that if you find that any witness has intentionally testified falsely as to any material matter, then you have the right to disregard all of the testimony
3342 of such witness.

*Henry* vs. *United States*, 273 Fed. 330.

DEFENDANT RADOVICH'S PRAYER NO. 9

The failure of any defendant to take the witness stand and testify in his own behalf does not create any presump-

tion against him; you are charged that you must not permit that fact to weigh in the slightest degree against such defendant, nor should that fact enter into your discussions or deliberations in any manner.

*Bruno* vs. *United States*, 308 U. S. 287.

DEFENDANT RADOVICH'S PRAYER NO. 10

A federal statute makes it a criminal offense for any person not being authorized by the sender to intercept any communication and to divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. 3344

In this case the witness, Anne Solomon, has testified that she listened in on certain telephone conversations between Major Radovich and Samuel Bayer; and she has testified concerning what was said in those conversations. You are instructed that, if this testimony is true, then Anne Solomon violated the law by listening in and divulging what she heard; and in weighing her testimony and determining whether or not it is true, you may give consideration to this fact, that if true, the testimony would show that the witness violated the criminal law. (See 47 USCA Sections 605 and 501; *Weiss* vs. *United States*, 308 U. S. 321.)

DEFENDANT RADOVICH'S PRAYER NO. 11

3345

You are instructed that if you find from the evidence that the witness, Anne Solomon, was an accomplice or co-conspirator of the defendant, Samuel Bayer, in doing any of the things charged against Samuel Bayer in the indictment, then you will receive the testimony of Anne Solomon with great caution.

3346 *Requests to Charge by Defendant Walter V. Radovich.*
*Proceedings.*

DEFENDANT RADOVICH'S PRAYER NO. 12

You are instructed that you may acquit any one of the defendants, while finding the other two defendants guilty.

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New York, October 23, 1945,
10 o'clock A. M.

TRIAL RESUMED.

3347 (The following proceedings were had in chambers not in the presence of the jury:)

Mr. Keenan: I want to bring to your attention a matter that I think is of very serious import. It just came to my notice last night after the argument, and it is of particular importance in view of the fact that the Government has had all of our books and records from 1943 and 1944 in their possession up to this time and, of course, has access to every movement that Major Radovich has made of importance during this period of time.

Now, for the first time in our peculiar system in this district of having to wait until the United States Attorney argues his case before we have any opportunity to know what he is going to say, and therefore can't answer in
3348 argument, and particularly in view of the fact that no such reference was made in the opening statement of counsel at all, although counsel had, as we all know, the statements of Samuel and Elias Bayer and also the statement of Ann Solomon, counsel fo the first time brings forth its theory of the case that the statement of Samuel Bayer was false about the meeting with Radovich on the 24th of November at Cavanagh's Restaurant, on the ground that Radovich could not have been there, since there is testimony in the

record from Miss Goertz, who produced no records at all, and testified that it was on the 24th of November of 1943 that she received a telephone call from Major Radovich at Goldsboro to her requesting the transfer of the enlisted men Bayer and Usdan to Wilmington, Delaware.

Now I find that I am informing this Court rather than waiting at a later time with newly discovered evidence that on the 24th day of November, 1943, exactly as testified to by Ann Solomon, there was a telephone call from Washington to Samuel Bayer and that this call was collect, and the United States Attorney's Office or the Federal Bureau of Investigation, or whatever agency is handling the matter, has that record of that call, and it is entirely consistent 3350
with our theory that this of course is the call from Radovich. We are having that further checked now with the Telephone Company—we know it was in the morning—to get the exact date. And, therefore, it puts me as counsel on notice that my clients are telling the truth. And with all of the power of the United States Government, and having control of our records, and we not having even access to them for examination, it is grossly unfair at this stage to make the pivot of the argument of Government counsel, with the impossibility of meeting the Government's requirement which is lodged upon and based upon the testimony of this witness, when the Government itself has evidence indicating strongly to the contrary, and of course, has the means and methods of showing exactly the movements of Major Radovich in an airplane on or about the 3351
date.

Now I am therefore asking your Honor that that statement either be corrected before the jury by the Government or else that we have the right at this date to open up our case and present evidence of dependable form of the movements of Radovich upon that date.

I say that because we never had the slightest notion that there was any claim made by the Government that the

statement of Samuel Bayer and Elias Bayer and Miss Solomon, which they had, the latter two, the two Bayers pursuant to our arrangement and the Solomon girl with our knowledge—we never had any notification that there would be any such claim on that part of the Government. And I am stating to this Court, on my honor as a lawyer, that we will prove that Radovich's movements did place him in this New York area and that he was here on the 24th and the 25th, too.

Your Honor has heard the argument of Government's counsel, of grave import, saying that our people are perjuring—are telling falsehoods, and it is all a concocted
3353 story about this meeting and it couldn't happen. It is of vital importance and justice in this case.

The Court: What has the Government to say?

Mr. McGohey: If your Honor please, the testimony of Miss Goertz went in in the regular course and there wasn't anything mysterious about it. She testified definitely that Radovich called her from North Carolina. Melvin Usdan, produced by the defendants, testified that it was the 24th that he called his father from Westover.

Mr. Keenan: We have the record of that call. That is correct.

The Court: What about this telephone call from Washington to New York?

Mr. McGohey: I don't know anything about it, your Honor.

3354 Mr. Keenan: They have our records, and it shows it. It is a collect call.

Mr. McGohey: I don't know whether it shows it or not. The records are—it is true that the records are here——

Mr. Keenan: We don't have them. They have been impounded and taken by the Government.

Mr. McGohey: May I finish?

Mr. Keenan: I beg your pardon.

Mr. McGohey: You will find no order impounding those records. Those records were subpoenaed.

Mr. Keenan: I withdraw that. I did not know that.

Mr. McGohey: They were brought down here. And from the time this case started, I don't know, I personally don't know and I don't know whether Mr. Wallace knows, whether any request was made by anybody on behalf of the defense to see those records. Certainly I know this, that I never refused anybody to have those records and I don't refuse them now and never have refused them.

As I see this, all this is an opportunity to reopen the case and answer testimony that was put in in the regular course. The argument that I drew from the facts in evidence is one thing, but the evidence went in; Miss Goertz testified early in the trial that the call she received from Radovich came from Goldsboro on the 24th. There wasn't any mystery about that; the defendants knew that when it went in. And Melvin Usdan's testimony was perfectly clear.

If you recall, your Honor, I examined him in the afternoon of the day he testified on direct and then during the night he said that he had refreshed his recollection from some memorandum that he had seen, and that he was then able to testify with definiteness that he arrived in Goldsboro on the 25th, that he left the day before, the 24th, and that is the day he called his father and that is the day he saw his father in the evening—not his father, but Melvin Usdan saw his mother and his wife, and Martin Bayer saw his father and mother, and whatever other members of his family. Certainly there wasn't any surprise in that, your Honor, no surprise in that at all. It was in the regular course. What the records of the Bayers show, I don't know. I didn't put them in evidence.

Mr. Keenan: I say, your Honor, that there is talk about impounding. I have misused that word. They were seized.

Mr. McGohey: No, they were not seized, your Honor; they were subpoenaed.

Mr. Keenan: Well, anyway they have been in the possession of the Government authorities before I appeared in this case.

Mr. McGohey: To the knowledge of the defendants.

Mr. Keenan: Not to my knowledge.

Mr. McGohey: To the knowledge of the defendants.

Mr. Keenan: And thereafter requests made by the Busches for their records, I am informed by Mr. Levy, and refused.

Mr. Wallace: Never.

Mr. McGohey: That is not true.

Mr. Keenan: Is that true, Mr. Levy?

3359 Mr. Levy: Yes.

Mr. McGohey: Did you ask for them on behalf of the Buschs?

Mr. Levy: No. They came in and asked themselves.

Mr. Wallace: They did not.

Mr. McGohey: They did not.

Mr. Keenan: Anyway, I would like to make this clear. I am saying that the Government has in its possession evidence of this fact of this telephone call of Radovich to the Bayers from Washington in the morning of November 24, 1943.

The Court: Confine yourself substantially to that. Have you such records?

Mr. McGohey: I don't know, your Honor. I have records of the Bayers; I don't know whether there is any such

3360 record in them.

Mr. Keenan: Have you the telephone records?

Mr. McGohey: I don't know. Have we?

Mr. Wallace: I don't know. We can go right up and find out whether there is any——

The Court: What do you say about that?

Mr. Keenan: I know that on the 24th of November there was a collect call from Washington to the Bayers' office.

That is the exact date that the witness Ann Solomon said she got a collect call from Radovich, from Washington to here. And I do know this, your Honor, in her statement, that I think is not in the record of course, Radovich flew in that day, and there is a record at LaGuardia Field when these men fly in, and the Government, I am sure, the F.B.I., has checked every movement of Radovich about these dates.

Mr. Wallace: I can speak for the F.B.I. on that. They have not checked any such records and we haven't got any such records.

Mr. Keenan: Why not?

Mr. McGohey: That is none of your business.

Mr. Keenan: I think it is my business and I am going to look into it. I know something about how these cases are investigated. 3362

The Court: You may look into it. You say you haven't any such records?

Mr. Wallace: No.

The Court: You don't know whether they are at La-Guardia Field?

Mr. McGohey (to Mr. Keenan): You go ahead and look into it.

Mr. Keenan: I am going to. I want nothing but the truth in this case.

The Court: Wait a minute, Mr. Keenan. Let me make my inquiry.

Mr. Keenan: I am sorry, your Honor.

The Court: Do I understand you to say you haven't a record of LaGuardia Field on the 24th of November? 3363

Mr. Wallace: We haven't, and we never had any such record.

Mr. Keenan: Can that be acquired from the Army?

The Court: I don't know.

Mr. Keenan: Is that not a fair thing, a vital thing, when the liberty of these men——

The Court: I was about to ask a question.

Mr. Keenan: I am sorry.

The Court: Do you know whether it can be ascertained; would there be such record?

Mr. Wallace: I have no idea whether there would be such a record or not.

The Court: How much do you know about the telegram? Do you know that——

Mr. Keenan: Telephone call.

The Court: I meant the telephone call. Do I understand you to say you know there was a collect call from Washington to the Bayers?

Mr. Keenan: On the 24th of November.

3365 The Court: Do you know who made the call?

Mr. Keenan: I don't.

The Court: Does the Telephone Company keep a record?

Mr. Keenan: Yes, they do. And I say this, your Honor——

Mr. Wallace: For a period of six months they keep records.

Mr. Keenan: I know this, your Honor, that the records that have been subpoenaed, I am informed, of the Bayers, the Plymouth Thread Company, would show the receipted bill and it would include this call.

The Court: Well, assuming that to be true——

Mr. Keenan: They could have looked at the thing. The accountant of the F.B.I. could answer that very readily.

The Court: What I want to know is, is there any record 3366 obtainable as to who made the call?

Mr. Keenan: I think there is, your Honor, and I hope, and I think Mr. Wallace is wrong when he said the record is kept for six months.

The Court: I know they destroy them after a period, but I don't know what period.

Mr. Keenan: I can say that Miss Solomon told me that she got this record from her inquiry with the Telephone Company. She wasn't able to get it because the records

were in the hands of the Government. But I do say, your Honor, that there should be no difficulty whatsoever in finding what the movements of Radovich were in an Army plane, on the 24th or 25th of November, 1943.

Mr. McGohey: If he flew in an Army plane would he be likely to be landing in an Army plane at LaGuardia Field?

Mr. Keenan: Yes. That is where they usually land.

Mr. McGohey: I thought they usually landed at Mitchel Field.

The Court: Aren't you mistaken about that?

Mr. Keenan: I know Navy planes land here, because I took off from there in a Navy plane. 3368

The Court: In a Navy plane?

Mr. Keenan: Yes.

The Court: I thought they used service planes at their own airport.

Mr. Keenan: I know that is not so.

The Court: I don't believe LaGuardia Field would have the record of the landing or the taking off of an Army plane.

Mr. Keenan: Yes, I think they have a record of the landing and taking off of every plane that comes in there.

The Court: Would it show the pilot?

Mr. Keenan: It would show the plane and pilot. I think this, your Honor, that there isn't a question in the world in my mind but the investigator force of the Army at least, and I have reservations about any other investigator force 3369 for the moment only, would know about the movements of Radovich; I know they know how to trace those movements, they would have them exactly, and I think this evidence could be very readily ascertained if anyone was interested in getting it.

Of course your Honor will recognize that it is very difficult for us in the preparation of this case, in wartime, and

even after, to get this information from the Army forces. As a matter of fairness, I am suggesting that.

Mr. McGohey: Miss Goertz's testimony is not challenged, your Honor. She was cross-examined.

Mr. Keenan: The import of it was——

The Court: The effect of her testimony is that Radovich called her from Goldsboro on the 24th of November.

Mr. McGohey: That is right.

The Court: That does not preclude the possibility of Radovich being in Washington later during the day, calling from there, and being in LaGuardia Field or being in New York that evening. I am not going to reopen any
3371 testimony, but what I am figuring about is to try to ascertain what would be agreed upon as facts so I may state them to the jury as facts.

Mr. Keenan: I would say, your Honor, I would rather do that and have the truth go before that jury than come back afterwards in the event of misfortune to the defendants in a verdict, to come in and ask that this case be reopened afterwards. That is the purpose in coming in here now, because I say to you that I think this is a terribly vital point in this whole prosecution.

The Court: I am not sold on that. But, still, I want to be fair. Have you any way of knowing from what you have got whether, in the first place, the Bayer records show a collect call from Washington to them on the 24th of November?

3372 Mr. McGohey: I have no way of knowing now, but whatever records we subpoenaed, your Honor, are here, and I am willing to get those records and get them right down here.

Mr. Keenan: Could we ask Mr. Brown if he has ever looked that up either. He is an accountant, and I think he would be the one from the F.B.I. who would check into that.

Mr. Wallace: I will ask him.

Mr. McGohey: Surely, go ahead.

The Court: Will you do that as quickly as you can?

(Mr. Wallace left the room and returned shortly.)

Mr. Wallace: Mr. Brown says that we have telephone records and bills; he has never gone through them, he doesn't know what period they cover, but they are here. They are down in Mr. Sharison's office; you know, he was using that at the time.

Mr. McGohey: All right, have him get them out.

The Court: Tell him to get the November bill and see if a collect call from Washington to the Bayers appears on there.

Mr. Cohen: That might be the December bill, Judge, because our bills run from November to December. The bills 3374
run up to November 23rd, and so forth.

(Mr. Wallace left the room and returned shortly.)

The Court: All right, sir, now go ahead.

Mr. Wallace: I have a bill of the New York Telephone Company, dated December 1, 1943, and attached to it is a list of out-of-town calls. Under the date of November 24th there is a call to Washington, also under the date of the 24th there is a collect call from Washington.

The Court: That is all it shows?

Mr. Wallace: That is all it shows. Also, it shows on the 24th a call to Westover Field and it also shows a collect call from Springfield.

Mr. Keenan: Massachusetts.

Mr. Wallace: It doesn't say. There are a lot of out-of-town calls, too. The bill is to Plymouth Thread & Rayon 3375
Corporation, 31 West 21st Street; $177.23 for out-of-town calls (handing to Court). Here are the calls, from these numbers to these numbers (indicating).

The Court: I thought you said something about two calls to Washington.

Mr. Wallace: There is a call to Washington. That (indicating) is to Washington, and this is from Washington (indicating), both on the 24th. One was $1.70 and the other I think is 70 cents.

The Court: How can you tell whether that is to or from there?

Mr. Wallace: Well, it has "collect" after it.

The Court: I understand.

Mr. Wallace: It is a call that is made. It says, "Place called" at the top of the heading. Westover Field, 23rd and 24th, two calls to Westover Field.

The Court: I am willing to state to the jury that the records of the Bayer concern show a call to Washington on the 24th and a collect call from Washington—only the Washington call—or to include a statement covering the Westover Field and the Springfield.

3377 Mr. Keenan: I think that is immaterial. The point I am raising is about the surprise point that is brought up for the first time in the summation.

The Court: I understand that you are——

Mr. Keenan: That is, I think the fair way to have done it would have been in the opening of the Government to have stated that they would prove that our claim that there was any such meeting as took place at Cavanagh's didn't and couldn't have taken place.

The Court: I am not going into that. I suggest that I am willing to, and will, if desired, state to the jury before charging them, that the record, that is the telephone bill of the Plymouth Thread Company, which is the Bayer concern, shows a collect call to Washington on November 24th.

Mr. Cohen: A call from Washington.

3378 The Court: A call from Washington. And I will mention the one to, also.

Mr. Keenan: If anything, we are interested——

Mr. McGohey: The first call was to Washington, $1.70.

Mr. Cohen: It was before the other one?

The Court: It appears on the list before, but that does not prove anything. They may have billed them differently.

Mr. Keenan: We claim in our defense that we got a telephone call from Major Radovich from Washington in

the morning, and that is shown, and also it is some evidence in my opinion of the unlikelihood of Radovich being in Goldsboro that day. It would be conclusive. But I also would like to have the Government produce its record as to the movements of Major Radovich on that day because I feel certain that they do have that information.

Mr. Wallace: We have no such record.

The Court: The Government has stated that it has no such record.

Now, Mr. Keenan, do you wish me to state to the jury what I said I would state to them?

Mr. Keenan: Yes, I do, and that you would state that you are making that at our request. 3380

The Court: All right, sir.

Mr. Robb: Do I understand that you are going to tell the jury that the records don't show who called, either way?

The Court: Yes, sir. You only wish me to mention the collect call?

Mr. Keenan: Yes.

Mr. McGohey: I think both calls ought to be stated.

Mr. Robb: If your Honor does not mention them both, we object.

Mr. Keenan: But it is not probative of any of the issues in this case.

Mr. McGohey: I think it is.

Mr. Keenan: I don't know, but there is no claim made for it.

Mr. McGohey: You claim—— 3381

Mr. Keenan: There is no claim that the call was or was not made or that anything—the Government makes no claim with reference to any call to Washington on that day, but we do make a claim that there was a call from Washington to us and we think it would be confusing to the jury to put anything other than the collect call that we received.

Mr. McGohey: I think that we ought to have both calls, and I think that the Court should state that those two

calls appear on a bill for the period stated, totalling one hundred seventy some odd dollars for out-of-town calls to various places.

The Court: What would be the materiality of the amount of the bill?

Mr. Keenan: I think your Honor that when that is read it ought to be stated that the Government has claimed that no such call took place.

Mr. McGohey: Oh, no.

Mr. Wallace: We never made any such claim.

Mr. Keenan: That is the——

Mr. McGohey: The Government never made any such
3383 claim and there is nothing in the record to substantiate that statement.

Mr. Ansell: I possibly do not understand the relevancy of this statement, but, of course, if any statement of fact is to go into the record, and if it is a circumstance that might operate to the disadvantage of Major Radowich, why, of course, we become interested at that moment. I probably have not been able to follow——

Mr. Keenan: Might it be stated that these records have been in the possession of the Government by subpoena from more than a year ago, and not in the possession of the defendants Bayer or the Plymouth Thread Company?

The Court: In the absence of any showing that they have been denied to you, I don't think that would be material. It might create an inference——

3384 Mr. Keenan: They had our records, they subpoenaed them, kept them, and never returned them.

The Court: I am not going into that.

Mr. Keenan: I want to except to the failure of the Court to mention that.

The Court: Very well.

Mr. McGohey: I want to state for the record that no demand or request at any time was made to have the records back or to see them.

The Court: All right.

Mr. McGohey: And they were available at all times.

Mr. Keenan: I don't know whether they were or not. I am not accepting that statement at all.

The Court: All right, let us proceed.

(The proceedings were resumed in open court in the presence of the jury, as follows):

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## Charge of the Court.

BARKSDALE, J.: 3386

The Court: Ladies and gentlemen of the jury, I am not going to reopen the taking of evidence but at the request of counsel for the defendants Bayer I will state to you that on a statement by the New York Telephone Company, dated December 1st, 1943, rendered to Plymouth Thread & Rayon Corporation, which is the Bayer concern, there appears an item on November 24th of a collect call to this concern from Washington.

At the suggestion of the Government, I state to you that the record also shows a call to Washington, November 24th, the same day.

You may consider those facts, along with all the other evidence in the case, and give those facts such weight as you may consider them entitled to in connection with any other evidence which you have heard. 3387

Mr. Robb: Would your Honor also say that the record—

The Court: I will also state that the facts which I have stated to you, or all the facts which do appear from this record, that is, the record does not show from whom the call came nor to whom the call to Washington went. All right.

Now, ladies and gentlemen of the jury, you have heard the evidence in this case and the arguments or summa-

tions of counsel, and it now becomes my duty to charge you as to the law of the case, and it will then be your duty to determine the facts from the evidence which you have heard, apply the law to these facts, and render a true and righteous verdict. In arriving at your verdict, you should base it entirely and solely on the evidence you have heard, and the law as I shall declare it unto you.

First I shall charge you as to certain general principles of law which are applicable to this case. You are in no way concerned with any punishment which may be imposed upon these defendants should you find them guilty. In the Federal courts, the Judge fixes the punishment, if
3389 any is to be imposed, and the amount of punishment to be imposed, or which might be imposed, should not enter into your deliberations at all. That is my responsibility. You are charged with one highly important duty, and only one, and that is to determine and say by your verdict whether these defendants, any of them, are guilty or not guilty of the offense charged.

The law presumes that these defendants, as well as all persons charged with a crime, are innocent until by competent evidence they have been proven to be guilty. The indictment creates no presumption of guilt nor does it constitute evidence against the defendants. To the benefit of this presumption of innocence, the defendants are entitled throughout their trial, and it stands as their sufficient protection until it has been removed in your opinion
3390 by evidence proving guilt to a moral certainty beyond a reasonable doubt. The defendants are not required to prove their innocence. The burden of proof rests upon the United States to prove beyond a reasonable doubt the guilt of the defendants before they can be found guilty, and there must be so proved all of the elements necessary to constitute the offense charged in the indictment.

It is not sufficient that the defendants, upon speculative theory or conjecture, may be guilty, or that by the pre-

ponderance of evidence their guilt is more probable than their innocence, for until their guilt has been proved beyond a reasonable doubt, and as charged in the indictment, the presumption of innocence still prevails.

Reasonable doubt does not import mere possible doubt, because everything relating to human affairs and depending on oral evidence is open to some possible or imaginary doubt. A doubt that is engendered solely by sympathy or by a dislike to accept the responsibility of conviction is not a reasonable doubt. A reasonable doubt exists if, after the entire comparison and consideration of all the evidence, your minds are left in such a condition that you cannot say that you feel an abiding conviction of the truth 3392
of the charge. A reasonable doubt is not a strained conjecture, but an actual sincere mental hesitation caused by either insufficient or unsatisfactory evidence.

You are the sole judges of the credibility of the witnesses and the weight to be given their evidence, and in determining this you are entitled to take into consideration their bias, their feeling, their interest in the outcome of the case, if any such appears, their manner of testifying, their candor and frankness, and any other matter which you would ordinarily consider in judging of the weight to be given to the statements of persons with whom you come in contact. If you are satisfied that any witness has testified falsely as to any material fact, you may disregard all of his or her testimony, or you may 3393
disregard such as you believe to be false and accept that which you believe to be true. If you are satisfied beyond a reasonable doubt that any defendant has made contradictory statements or has improperly altered records or caused them to be changed, you may consider such facts in your consideration of the evidence.

If you should believe from the evidence that any witness who has testified in this trial was an accomplice, that is, an active and knowing participant in the alleged con-

spiracy, you should consider the testimony of any such witness with great caution. You should compare such testimony with the other testimony in the case, with all the admitted facts and circumstances, and scrutinize and weigh it with the utmost care so that you satisfy your minds as to the truth or falsity of such evidence, or any part thereof. And any comments which I may make upon the evidence are, at most, only expressions of my opinion, made in an effort to assist you, and are meant in no way to interfere with or impinge upon your function and prerogative of determining the facts from the evidence.

Defendants do not have to take the witness stand in their
3395 own behalf. They may, if they choose, submit their cases on the evidence of the Government and of other witnesses, and you are not to draw any inference of guilt from the fact that neither of the defendants has testified in his own behalf.

Certain witnesses have testified that the defendants Bayer bore a good reputation in business and in their home communities. Also, you have heard read certain citations awarded to the defendant Radovich which you may, if you wish, consider as evidence of good character.

In your consideration of the cases of each defendant you may consider this testimony and attach to it such weight as you think proper. You should consider such evidence along with all the other evidence in the case, and if considered along with all the other facts and circumstances
3396 of the case such evidence should raise in your minds a reasonable doubt of the guilt of any defendant, you should find such defendant not guilty. However, the fact that a person bears a good reputation is no justification for the commission of crime, and if you are satisfied beyond a reasonable doubt that any defendant is guilty, then the fact that such defendant bears a good reputation or has been awarded citations would be no reason or excuse whatever for a finding of not guilty as to such defendant.

Now, as to the particular offense charged in this case: the gist of the charge made in the indictment in this case is that the defendants unlawfully, wilfully and knowingly did combine, confederate and agree together and with each other to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, the particular object being to procure the defendant Radovich, other than in the honest discharge of his duty, to prevent the sending of privates Martin Bayer and Melvin Usdan out of the continental United States for combat duty. 3398

This is what is known as an indictment for conspiracy. A statute of the United States provides that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, it shall be a criminal offense.

As an officer of the United States Army it was the duty of the defendant Radovich to render to his country honest and faithful service, free from corruption, dishonesty or partiality, and it would be a fraud upon the United States for the defendant Radovich as such an officer to deviate from such duty.

In order to constitute a fraud on the Government it is not necessary that the Government suffer any monetary or financial loss. To deprive the Government of the United States of the honest and faithful services of any of its officers constitutes a fraud irrespective of whether or not the Government suffers financial loss. 3399

So, if the defendant Radovich and the defendants Samuel and Elias Bayer, or any two of them, entered into an agreement that the defendant Radovich would act corruptly, dishonestly, or by reason of bias or partiality, and not render faithful, honest and disinterested service to

the United States, or to induce said defendant Radovich so to do, then there would be an agreement to defraud the United States. And if such an agreement was followed by the doing of any overt act by any one of the three for the purpose of carrying out the object of the agreement, then the agreement would be a conspiracy as set out in the statute.

Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Com-
3401 mando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer.

The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not
3402 have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

In your consideration of this question, you should consider not only the statement of the defendant Bayer, and the testimony of the witness Anne Solomon, but all the other evidence in the case except the statement in writing 3404
of the defendant Radovich.

There are many acts which by law are made crimes against the United States Government, but in addition to such substantive offenses it is made a separate and independent offense under the laws of the United States for two or more persons to conspire or join together in an agreement to defraud the United States, and do some act pursuant thereto; and persons may be, in a proper case, convicted of conspiracy, as well as for the substantive offense or offenses, or without being tried for the substantive offense. The indictment here, with which you are solely concerned, does not charge any substantive offense. It charges the defendants in one count with a separate and independent offense of having conspired to 3405
defraud the United States, and even though you should be satisfied beyond a reasonable doubt that one or more of these defendants are guilty of some substantive offense, such as bribery, before you should convict them upon the charge set out in the indictment, you must further be satisfied beyond a reasonable doubt that there was a previous agreement or understanding among them to defraud the United States, and that some act or acts charged in the

indictment were done by one or more of the defendants to carry out this understanding or agreement.

The reason why conspiracy is made a separate offense is because it is believed that, with two or more persons combined to defraud the United States, the danger to the Government from such concerted action is greater than that from a fraudulent act indulged in by one person alone, and justifies the making of the combination or agreement itself a separate crime.

I shall undertake to make clear to you, if I can, the nature of such a conspiracy as is here charged, and what constitutes it. A conspiracy is an agreement or understanding between two or more persons to defraud the 3407 United States, and it exists whenever there is a conspiracy, agreement or understanding between two or more persons for that purpose, followed by the doing of some act furthering the scheme. It is not necessary that they should meet together and enter into any formal or definite agreement as to the things which they intend to do, or that they should agree formally on the details or plans by which the unlawful combination could be made effective. The offense is sufficiently proven if you are satisfied beyond a reasonable doubt that these three defendants or any two of them acted together for the accomplishment of a fraud upon the United States, and that in this unlawful purpose they acted with the mutual or common understanding as to the purpose to be accomplished, or co-
3408 operated together in the accomplishment of this purpose, followed by some act done by one of the parties for the purpose of carrying out the object of the agreement or understanding.

It will be plain to you that a conspiracy may be, and of necessity often must be, shown by circumstances rather than by definite proof of any actual agreements entered into. Persons who contemplate defrauding the United States are not accustomed to make their plans known to

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the outside world, and it is usually necessary in considering whether or not a conspiracy exists to consider all the facts and circumstances proven in the case. The existence of a conspiracy may be proved by facts and circumstances as the natural and logical inference from these facts and circumstances. The acts charged to have been done in pursuance of the conspiracy may themselves be of such nature as to prove the existence of a conspiracy without the aid of separate and independent proof of any agreement. However, in order to justify a conviction, the facts and circumstances relied upon must not only be consistent with guilt, but inconsistent with any reasonable hypothesis of innocence.

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If an agreement or understanding was entered into or reached by any two or more of the defendants named in this indictment to defraud the United States, as charged in the indictment, then any other person or persons who participated in this common purpose with knowledge of it would be guilty of conspiracy, even if their participation first took place after the orginal agreement was formed, and even though they had no part in the formation of the original agreement and no knowledge of it at the time it was formed, and even if they were unacquainted with and had no knowledge of the activities of all the remaining persons who also might be acting to aid the purposes of the conspiracy. The indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

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It is necessary, however, that each person who is to be held to be a member of a conspiracy should have knowledge of the unlawful purpose sought to be accomplished and should intend to be acting with other persons in the accomplishment of this unlawful purpose. However, it is not necessary that all of the persons taking part in a conspiracy should play parts of equal importance or activity. Anyone who acts with others in the accomplishment of an unlawful purpose, knowing it to be unlawful, or fraudulent purpose, knowing it to be fraudulent, is guilty of conspiracy, whether his activities in the fraudulent purpose were great or small. It is sufficient to convict a de-
3413 fendant of the offense of conspiracy if he knows in a general way of the purpose of two other persons to defraud the United States and then assist in any way to accomplish the purpose, no matter how great or how small the assistance which he gives to accomplish the purpose.

The indictment sets forth that this conspiracy came into existence on September 1, 1942, and I wish to state that the date of the origin of the conspiracy is not of importance, and if a conspiracy existed it is not necessary for the Government to prove that it came into being on the date named in the indictment, nor on any specific date. A conspiracy may be of gradual development, and in this case it is sufficiently proved if you believe beyond a reasonable doubt that at any time subsequent to September 1, 1942, and prior to the return of this indictment on July
3414 12, 1945, a conspiracy existed as it has been previously defined to you.

Acts done by conspirators in furtherance of a conspiracy are called overt acts. I wish to explain to you the nature of an overt act and the part it plays in the prosecution for conspiracy. Conspiracy is punishable as an offense under the statute I have previously referred to, only if an agreement or understanding has been formed to defraud the United States, followed by some step known as

an overt act taken to carry out the proposed scheme. The law recognizes that persons might have an agreement or understanding to engage in a criminal activity, but they might repent of that decision or for some reason abandon it without taking any step to commit the offense, and in such case they would not be guilty of the crime of conspiracy. If, however, having entered into an agreement or understanding to defraud the United States, they take any step or commit any act toward the completion of the offense, thereby evidencing their intention to go through with the conspiracy, the offense would be complete, irrespective of whether or not the plan was finally carried through to a successful conclusion.

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The overt act need not itself be of a criminal nature. It may be an act perfectly innocent in itself. But if it is an act done for the purpose of carrying out an unlawful agreement, then the crime of conspiracy has been committed and completed. Therefore, it is not necessary that overt acts shown to have been committed or steps taken in furtherance of a conspiracy are in any way criminal or forbidden in themselves, but it is necessary only to show that some act of some sort as charged in the indictment was done for the purpose of carrying out the object of the agreement previously arrived at, and when an overt act has been committed by any one member of a conspiracy, it makes all persons co-conspirators who participate in the unlawful agreement with knowledge of its unlawful nature, whether they were original parties to it or whether they came into it at a later time. It is not necessary that the Government prove the commission of all the overt acts charged in the indictment. If the commission of any one of these overt acts be proved beyond a reasonable doubt, that is sufficient.

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I have admitted for your consideration the evidence of F.B.I. Agent Flynn as to the statements of the defendants Samuel Bayer and Elias Bayer, and also their typewritten statements in question and answer form, and

also their statements read from the shorthand notes of the witness Sergeant Lasko as given to Colonel Snyder when he questioned them at their place of business, and also the statement of the defendant Radovich, in narrative form, written out by the witness Flynn and signed before witnesses by the defendant Radovich in March of this year.

At the time these statements were admitted I charged you specifically that each of these statements might be considered by you in your consideration of the charge against the person making the statement, but that you must not consider such statement as evidence against the
3419 other defendants. I repeat that charge and admonition to you.

These statements of the defendants considered alone would not be sufficient evidence for the conviction of all or any one of the defendants. In your consideration of the guilt or innocence of each defendant you may, and you should, take into consideration his statement, or statements made before his trial, but before you agree upon a conviction of any one or more of the defendants you should be satisfied beyond a reasonable doubt that such statements are corroborated by the substantial independent evidence of witnesses who have testified during the course of this trial. These statements, considered alone, do not constitute sufficient evidence of the existence of a conspiracy, but if you are satisfied beyond a reasonable doubt
3420 from the other evidence in the case that a conspiracy between any two of the defendants did exist, then you may consider the statement of each defendant in your consideration of whether or not that defendant was a party to the conspiracy.

Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor in-

duced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.

I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function 3422
to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

To summarize briefly, ladies and gentlemen, if you are satisfied from the evidence beyond a reasonable doubt that all or any two of the defendants entered into a conspiracy or unlawful agreement to defraud the United States as I have previously defined it to you, and that any one of them did any one of the overt acts charged in the indictment, you should find such defendants guilty. As to any defendant or defendants about whom you are not so satisfied, you should find such defendant or defendants not guilty.

Depending on your conclusions from the law and the 3423
evidence, you may acquit all of the defendants, you may acquit one and find the other two guilty, or you may find all three defendants guilty as charged.

Now you may retire, ladies and gentlemen, but do not undertake to decide the case until I hear counsel and determine whether or not to add anything to what I have said to you. You may retire to your room.

(The jury retired at 11:05 A. M.)

The Court: All right, if you are ready, counsel for defendant Radovich may state objections.

Mr. Robb: We have certain exceptions which we would like respectfuly to take to your Honor's charge.

We except to your Honor's failure to charge as requested in our prayer No. 2, that the presumption of innocence is evidence in our favor, or evidence in favor of the defendant Radovich.

We except, if the Court please, to give our prayer No. 3 as requested.

We except to your Honor's charge on evidence as to good character and in particular to your Honor's failure
3425 to instruct that while the jury must consider evidence of good character, together with all the other evidence, such evidence of good character may itself create a reasonable doubt and require a verdict of not guilty.

And in that connection we also respectfully except to your Honor's failure to mention the testimony of the witness Colonel Boebel, who testified that the reputation of the defendant Radovich was "the best".

In connection with the testimony as to good character, your Honor mentioned only the medals and citations.

We respectfully except to your Honor's summary of the indictment in this case on the ground, with all deference to your Honor, that the indictment does not state the object of the conspiracy as clearly and as succinctly as your Honor stated it, and that the object of the conspiracy in
3426 fact is stated quite differently in the indictment.

In short, with all respect to your Honor, we suggest that your Honor's summary was not entirely accurate.

We except, if the Court please, to your Honor's summary of the evidence concerning the contention of the Government and the contention of the defendants Bayer as to the payments to Major Radovich, upon the ground that your Honor did not mention the contention of the

defendant Radovich, that as to him the Government has failed to prove that any payments were made.

We respectfully except to your Honor's statement to the jury that your Honor held as a matter of law that the statement made by defendant Radovich to Agent Flynn was not coerced. We respectfully submit that that is a question which should now be decided by the jury and they should not be told that your Honor has decided that question.

And, in that connection, we respectfully except to your Honor's failure to give prayer No. 6 and 6-A, requested by the defendant Radovich.

We further except in that connection to your Honor's 3428
statement to the jury that their only function is to determine whether or not the statement, if any made, by the defendant Radovich, was true. We respectfully suggest that they should also determine whether or not it was coerced, and if it was in any degree coerced, whether it was true or not, they should reject it.

We respectfully except, if the Court please, to the Court's failure to give prayer No. 3 requested by the defendant Radovich on the subject of reasonable doubt; and prayer No. 5 on the subject of substantial evidence; your Honor's failure to tell the jury in connection with the requirement of substantial independent proof, independent of the statement of any defendant, that the burden is upon the Government to establish such proof beyond a reasonable doubt.

We respectfully except to your Honor's failure to in- 3429
struct the jury as requested in prayer No. 10, submitted by the defendant Radovich in connection with the testimony of the witness Ann Solomon.

And to your Honor's failure to instruct the jury as requested in prayer No. 11, with reference to the testimony of the witness Ann Solomon.

We also suggest to your Honor respectfully and except to your Honor's failure to tell the jury that under the

theory of the indictment which alleges "to the grand jury unknown" it would be possible for the jury in this case upon the evidence to convict any one of these three defendants and acquit the other two.

If your Honor please, it has just been pointed out to me by General Ansell that your Honor, in your Honor's summary of the indictment, stated that the object of the conspiracy was to defraud the United States of the honest and faithful service of the defendant Radovich alone, whereas the indictment alleges that the purpose of the conspiracy was to defraud the United States of its right to the conscientious, faithful and unbiased services of officers of the United States Army, the allegation not being limited to the defendant Radovich alone.

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We further except to your Honor's failure to tell the jury as I have indicated. Thank you.

The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

All right, Mr. Keenan.

Mr. Keenan: The defendants Samuel and Elias Bayer respectfully except to the failure of the Court to charge in accordance with the 16th request, namely, that as a matter of law fraud is never presumed, and that, on the contrary, the presumption in law is parties in their business and other relations are prompted by honest motives.

The defendants Bayer likewise except to the failure of
3432 the Court to charge paragraph (I) in the 28th request, that is, the important matter of informing the jurors that the verdict which they render must represent the real judgment and honest conclusion of each juror, and to further charge them upon their oaths that in arriving at that conclusion no one was required to surrender his earnest belief concerning guilt or innocence of the defendants for any purpose, in accordance with the case of Allen v. United States, 164 U. S. 492.

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Defendants Bayer respectfully except to the failure of the Court to charge in accordance with the 29th prayer, that in the opening statement setting forth the Government's theory of prosecution, the United States Attorney stated that evidence would be presented that arrangements were made through the intercession of the Bayers with Major Radovich and others of the officers to have the two boys, Martin Bayer and Melvin Usdan, transferred from headquarters of the Base to headquarters of the First Fighter Command, there being no evidence in the case presented to prove this vital part of the Government's case, and, to the contrary, the evidence showing clearly no such fact.

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The defendants Bayer respectfully except to the failure of the Court utterly to charge on the vital matter of the requirement for basic training to be given to enlisted men, the said two enlisted men, the evidence showing in the case clearly that they are required to have three months' basic training, and the evidence showing clearly that under no hypothesis of findings of any fact in the evidence could they have received more than two weeks' training; and that such requirements were in accordance with the regulations, as proven by the testimony offered by the Government, particularly the witness Captain Pepper.

The defendants Bayer respectfully except to the Court's failure to charge the jury that the undisputed evidence in the case shows that the Commando unit at Goldsboro was a volunteer organization to which the enlisted men could not be assigned without their consent. And that, further, the Court, with great respect, we believe was in error in failing to charge that the testimony in the case likewise shows that the Airborne Engineers was a volunteer outfit and therefore required consent before there could be a lawful transfer thereto.

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We respectfully request the Court now to charge the jury that in the event the proposed transfers of these two

enlisted men were not in accordance with the regulations of the Army, as shown in the evidence, that any effort upon the part of either of the defendants Bayer to prevent such transfer would not be a conspiracy to defraud the United States.

The defendants Bayer except generally to the failure upon the part of the Court to adequately charge on the theory of defense of either and both defendants Bayer.

The defendants Bayer respectfully except to the Court's failure to charge that the mere solicitation of transfers or refraining from transferring men, made to any officers, in and of themselves would constitute no unlawful act
3437 or no fraud against the Government.

The defendants Bayer further except to the failure on the part of the Court to charge the jury that, regardless of the fact that conspiracies or agreements need not be in writing, need not be made at any precise time or in any formal manner, nevertheless the agreement or plan or design of the conspiracy must be clearly shown beyond a reasonable doubt as one of the essential elements of the prosecution's burden, and a failure to so do beyond a reasonable doubt would require, in and of itself, with nothing more, a verdict of not guilty on behalf of the two Bayers.

The defendants Bayer further except to the Court's failure to charge on the irrelevant and immaterial mat-
3438 ter contained in the statements introduced in evidence by the Government of Samuel and Elias Bayer, and specifically except to that action of the Court failing to point out to the jury at this time that in looking over such statements in their jury room they should examine each and every statement with reference to its relevancy to any matter upon which the Court has charged; and a failure to associate it or relate it to any such matter thus made relevant to this prosecution should require the jury to

utterly disregard any such statement and not speculate with reference thereto.

Defendants Bayer respectfully except to the Court's failure to state that, particularly where fraud is charged, the matter of the good reputation or character of the defendants is of especial importance; and further except to the linking together in its charge on a most important matter of character witnesses and that type of testimony, the charge with reference to the two Bayers and Major Radovich, since Major Radovich offered no character witnesses in his defense and apparently relied upon citations of valor as good conduct in that respect; and that such failure on the part of this Court was confusing and failed 3440
to set forth clearly to the jury that to which the defendants Bayer were clearly entitled.

We respectfully request the Court to charge the jury that the good reputation of the Bayers up until the time of the incidents complained of has not been disputed by the Government and that no proof has been offered in contradiction thereto.

And we specifically ask the Court at this time to charge the jury on the subject matter of alias, the meaning of the word "alias" and that the jury should in no manner or fashion be misled or prejudiced by any such allegation contained in the indictment; that no proof of any use of alias has been offered by the Government and that matter must be entirely disregarded by them and no improper in- 3441
fluence registered therefrom in their minds by reason of such unproven allegation.

The Court: Is there such a prayer in your rather comprehensive list of prayers?

Mr. Keenan: I think there is, your Honor. If there isn't, I am asking for it now.

The Court: If it is, then I would like to have my attention pointed out to it.

Mr. Keenan: May I come back to that in a moment, your Honor?

The Court: Yes.

Mr. Keenan: The defendants Bayer further except to the failure upon the part of the Court to charge this jury that with reference to the payments of any sums of money to Radovich, there is no proof of any kind before them, other than the statements of Samuel Bayer and Elias Bayer, and, therefore, with reference to any such payments or the manner in which they were made, there being no other evidence before the jury, that they will be confined to consideration of the same in arriving at any determination in reference thereto.

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The defendants Bayer except to the failure of the Court to charge that in the event the charge is confused in attempting to separate the information considered by them in the various statements, alleged admissions or confessions of the several defendants, and a confusion thereby comes about in their minds which they cannot set aside, that that could generate a reasonable doubt in their minds and would be sufficient justification for a verdict of not guilty towards the defendants so affected.

Then the defendants Bayer except to the Court's failure to give that part of prayer 65, that if the jury finds that the defendants made various gifts to Radovich for the purpose of having the defendant Radovich perform his lawful duty, then in such event such gifts would not constitute any evidence of an attempt to defraud the Government.

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The defendants Bayer except to the Court's failure to charge the jury that the defendants Bayer cannot call or compel the defendant Radovich to testify and that that is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of the said defendants Bayer in their defense.

Your Honor, I do not find for the moment in these prayers the reference to the alias matter, but nevertheless I am asking the Court to make that amendment to his charge on the ground that it is obviously correct, and the point raised by the defendants is quite important in this case where fraud is the essence of the complaint.

Your Honor, my colleague calls my attention to the fact that, as he understood the Court, the Court said, "If you believe a witness has testified falsely in any part of her testimony——"

The Court: "His or her testimony."

Mr. Keenan: I confess that I did not hear that myself, and I don't know what the Court said, I have forgotten; 3446
but my colleague brings it to my attention, and I am asking your Honor to examine that to see if—I feel quite sure that your Honor would not intend to single out any gender or any particular witness.

The Court: It reads, "If you are satisfied that any witness has testified falsely as to any material fact, you may disregard all of his or her testimony, or you may disregard such as you believe to be false and accept that which you believe to be true."

Mr. Keenan: I withdraw that request, your Honor. I didn't hear it, but my colleague had suggested that.

Now, finally, your Honor has charged this jury already in one particular that I think is clearly erroneous, with great respect to the Court, and that is where your Honor 3447
has said that as to these so-called admissions or statements of the defendants introduced in evidence, such statements can be considered against him alone, but all other statements are admissible against the other defendants.

The Court: I don't think I quite understood you. Do you mind repeating what you said?

Mr. Keenan: Yes, I will repeat it as I recall it. Your Honor was charging on the subject matter of these admissions that had been offered of the two Bayers and Major

Radovich. And you said, you charged the jury that each defendant—that such evidence contained in such exhibit was admissible only against the particular defendant making it, and then you added a phrase, as I recall it, that all other statements would be admissible against that said defendant. And I except to it and ask that it be corrected on the ground that it is at least confusing to the jury and I think it improperly states the law. My point is, your Honor, that it would permit other statements made to be considered by the jury against an individual defendant although he did not make them.

Mr. Ansell: If your Honor please, would you bear with
3449 me to make one more exception?

The Court: Certainly.

Mr. Ansell: Your Honor charged the jury that the jury should draw no inference from the failure of the defendant to take the stand. We except to that as being not sufficiently restrictive upon the jury, and again request your Honor to charge in accordance with our prayer No. 9, that the fact that an accused does not take the stand should not enter into the jury's discussions or deliberations in any manner.

The Court: Is that all?

Mr. Ansell: Yes, sir.

Mr. Keenan: Your Honor, one final statement.

The Court: Let me rule on that.

Mr. Keenan: I am sorry.

3450 The Court: Although not in the exact words of the opinion in the case of Bruno v. United States, I think my charge on that subject carries out the spirit of it. And I will overrule that objection. Exception may be noted.

Mr. Ansell: Exception.

The Court: All right, sir.

Mr. Keenan: Your Honor, finally the defendants now, in view of the argument of the United States Attorney, or summation, wherein he referred to various noted flyers

in the country and addressed the remarks to the jury of what would hapen if certain conduct had been adopted by their parents or others in relation to them, which we respectfully contend was an argument addressed to the passions of a jury in times of war, we ask now the Court to charge the jury in accordance with the authority of Wolf v. United States, from the Eighth Circuit Court of Appeals, May 13, 1919, found in 259 Federal Reporter, on page 388, the last page, 394, and the charge that we ask of your Honor is to charge the substance of the following——

The Court: Do I understand that that is not included in the prayer submitted before summation either? 3452

Mr. Keenan: That is true. Because it is particularly suggested——

The Court: All right. I just wanted to be informed. Go ahead.

Mr. Keenan: "The greatest danger to justice from a jury is through the confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural in time of war, when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the Court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations which must be 3453 constantly borne in mind or the verdicts of juries in such cases will mistakenly become expressions of their hatred for unpatriotic acts in general instead of their careful judgment on the facts shown by the evidence in a particular case. Patriotism must not become even innocently a cloak for injustice. The right of an accused in the courts of this Nation to a fair trial must not vary with the char-

acter of the crime. The variation permitted is in the punishment but that comes only after a fair trial."

The Court: I heard General Ansell as to his supplemental objection before I had ruled upon your previous objections. The action of the Court as to them is to overrule the objections and motions, and exceptions may be noted.

I will mention the matter of alias to the jury when they come in.

As to the last objection or motion, rather, made by Mr. Keenan, I overrule the objection, and in the absence of the jury take occasion to say that in my opinion the summation of the United States Attorney was notably re-
3455 strained and in good taste.

All right. Now, what has the Government to say?

Mr. McGohey: No further requests, your Honor.

The Court: All right. Bring the jury in.

(The jury came into the court room at 11:40 A. M.)

The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word "alias" is "other or otherwise", and carries no inference. However, in common acceptation of the word it sometimes is considered to refer
3456 to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became American-

ized. So I direct you to disregard the alias reference entirely.

Now, ladies and gentlemen, I am going to ask you to retire to your room and consider your verdict, and I am going to send with you all the exhibits in the case—they are not bulky or cumbersome, and you may want some of them, but I am going to send them all.

If you wish to hear any evidence, that is, the transcript, you may so inform me, and I will have it read. I think in all likelihood you probably, without having in your mind the precise words, remember the evidence which you heard, but if you are doubtful or if there is any conflict between you about what any particular witness said, if you so re- 3458
quest I will bring you back and have such testimony as you wish read.

Mr. Keenan: I take exception, your Honor, to the manner in which you charged on the alias.

The Court: Yes, sir.

Mr. Keenan: As being in itself inflammatory.

The Court: You may note an exception.

All right. If during your deliberations you should desire any further elucidation on the matter of the law and its application to the facts, I will endeavor to give it to you upon request.

In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you 3459
received any. All right.

Do you want to except to that?

Mr. Keenan: I didn't hear your Honor.

The Court: I said, did you wish to except to what I said then?

Mr. Keenan: I didn't hear you. I do have a little difficulty in hearing, your Honor, back here, all that you said.

The Court: I am sorry, but——

Mr. Keenan: I would be glad to look at it and see if there is any reason why I should.

The Court: All right.

(Alternate jurors excused and officers sworn.)

The Court: I wish to thank you alternate jurors for your service.

The court will now take a recess.

(Jury retired at 11:45 A. M.)

(The reporter read the statement of the Court previously referred to.

Mr. Keenan: Yes, I do wish to except.

3461 (Recess until 2:15 P. M.)

(The jury returned to the court room at 3:45 P. M.)

The Court: I do not see Mr. Keenan.

Mr. Cohen: Mr. Keenan is unavoidably detained where he went. I will try to do the best I can in his absence.

The Court: You have no objection to proceeding without him?

Mr. Cohen: I have no objection—what?

The Court: To proceeding without him?

Mr. Cohen: No.

The Court: Gentlemen of counsel and ladies and gentlemen of the jury, I have two written communications from the jury. The first one:

"Are we allowed to recommend clemency? Yes or no?"

3462 I can answer that without difficulty. You are allowed to recommend clemency, if you please, although you are not required to make any recommendation one way or the other, and in fairness I should say that your recommendation for or against clemency would not, under the law, be binding upon me. As I explained to you at the outset, the matter of whether punishment should be imposed, and, if so, what, under the Federal law governing this trial is a matter entirely for the Judge. But should you wish to make a recommendation, you may do so.

Now the other communication is:

"Summation of District Attorney and the Judge's charge to the jury."

I should like for you to be more specific as to——

The Foreman: May I come up?

The Court: —as to what you mean by that?

The Foreman: May I speak from here?

The Court: Just speak out so that we can all hear you.

The Foreman: In your summation particularly having to do with conspiracy, and the request was for the whole summation by the District Attorney.

The Court: Well, taking the two questions up in order, 3464
I don't think, ladies and gentlemen, that it would be proper to send in to you the summation of the District Attorney without sending in the summations of all counsel, and besides that, the summation of the District Attorney—I don't know whether it has been transcribed in writing or not, but whether it is or not, I don't think that it would be proper to send in to you the summation of one counsel without sending in them all. Nor do I think it would be proper to read one without reading them all, and I don't gather that you wish that.

Now, if the person who made that suggestion or request will be specific as to what portion or what phase of the District Attorney's summation they would like refreshment on, I will undertake to answer any questions 3465
which you may ask as best I may.

The Foreman: The principal thing, your Honor, is your charge to the jury concerning conspiracy.

The Court: And it is only, if I understand you correctly, the part which pertains to conspiracy which you wish to hear now?

The Foreman: That is right, sir.

Mr. Ansell: May I ask, pertaining to what, your Honor? I couldn't hear.

The Court: Conspiracy. Now in reading this part, ladies and gentlemen, I do not wish to be construed as emphasizing this part. I hope you will bear in mind all of the charge as given this morning. And at your request I am going to read that part which I gather you desire read, and I may read a little bit more.

Now as to the particular offense charged in this case: The gist of the charge made in the indictment in this case is that the defendants unlawfully, wilfully and knowingly did combine, confederate and agree together and with each other to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and
3467 judgment of the defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, the particular object being to procure defendant Radovich, other than in the honest discharge of his duty, to prevent the sending of privates Martin Bayer and Melvin Usdan out of the continental United States for combat duty.

That is what is known as an indictment for conspiracy. A statute of the United States provides that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, it shall be a criminal offense.

As an officer of the United States Army it was the duty of the defendant Radovich to render to his country honest
3468 and faithful service, free from corruption, dishonesty or partiality, and it would be a fraud upon the United States for the defendant Radovich as such an officer to deviate from such duty.

In order to constitute a fraud on the Government it is not necessary that the Government suffer any monetary or financial loss. To deprive the Government of the United States of the honest and faithful services of any of its officers constitutes a fraud irrespective of whether or not the Government suffers financial loss.

So, if the defendant Radovich and the defendants Samuel and Elias Bayer or any two of them, entered into an agreement that the defendant Radovich would act corruptly, dishonestly, or by reason of bias or partiality, and not render faithful, honest and disinterested service to the United States, or to induce said defendant Radovich so to do, then there would be an agreement to defraud the United States. And if such an agreement was followed by the doing of any overt act by any one of the three for the purpose of carrying out the object of the agreement, then the agreement would be a conspiracy as set out in the statute.

Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for immediate dangerous overseas mission, which would be a violation of his duty as an officer. 3470

The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement not any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged 3471

in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

In your consideration of this question, you should con-
3473 sider not only the statement of the defendant Bayer, and the testimony of the witness Anne Solomon, but all the other evidence in the case except the statement in writing of the defendant Radovich.

There are many acts which by law are made crimes against the United States Government, but in addition to such substantive offenses it is made a separate and independent offense under the laws of the United States for two or more persons to conspire or join together in an agreement to defraud the United States, and do some act pursuant hereto; and persons may be, in a proper case, convicted of conspiracy, as well as for the substantive offense or offenses, or without being tried for the substantive offense. The indictment here, with which you are solely concerned, does not charge any substantive offense. It
3474 charges the defendants in one count with a separate and independent offense of having conspired to defraud the United States, and even though you should be satisfied beyond a reasonable doubt that one or more of these defendants are guilty of some substantive offense, such as bribery, before you should convict them upon the charge set out in the indictment, you must further be satisfied beyond a reasonable doubt that there was a previous agreement or understanding among them to defraud the United States, and

that some act or acts charged in the indictment were done by one or more of the defendants to carry out this understanding or agreement.

The reason why conspiracy is made a separate offense is because it is believed that, with two or more persons combined to defraud the United States, the danger to the Government from such concerted action is greater than that from a fraudulent act indulged in by one person alone, and justified the making of the combination or agreement itself a separate crime.

I shall undertake to make clear to you if I can, the nature of such a conspiracy as is here charged, and what constitutes it. A conspiracy is an agreement or understanding 3476
between two or more persons to defraud the United States, and it exists whenever there is a conspiracy, agreement or understanding between two or more persons for that purpose, followed by the doing of some act furthering the scheme. It is not necessary that they should meet together and enter into any formal or definite agreement as to the things which they intend to do, or that they should agree formally on the details or plans by which the unlawful combination could be made effective. The offense is sufficiently proven if you are satisfied beyond a reasonable doubt that these three defendants or any two of them, acted together for the accomplishment of a fraud upon the United States, and that in this unlawful purpose they acted with the mutual or common understanding as to the purpose to be accomplished, or cooperated together in the accomplishment of 3477
this purpose, followed by some act done by one of the parties for the purpose of carrying out the object of the agreement or understanding.

It will be plain to you that a conspiracy may be, and of necessity often must be, shown by circumstances rather than by definite proof of any actual agreement entered into. Persons who contemplate defrauding the United States are not accustomed to make their plans known to the outside

world, and it is usually necessary in considering whether or not a conspiracy exists to consider all the facts and circumstances proven in the case. The existence of a conspiracy may be proved by facts and circumstances as the natural and logical inference from these facts and circumstances. The acts charged to have been done in pursuance of the conspiracy may themselves be of such nature as to prove the existence of a conspiracy without the aid of separate and independent proof of any agreement. However, in order to justify a conviction, the facts and circumstances relied upon must not only be consistent with guilt, but inconsistent with any reasonable hypothesis of innocence.

3479 If an agreement or understanding was entered into or reached by any two or more of the defendants named in this indictment to defraud the United States, as charged in the indictment, then any other person or persons who participated in this common purpose with knowledge of it would be guilty of conspiracy, even if their participation first took place after the original agreement was formed, and even though they had no part in the formation of the original agreement and no knowledge of it at the time it was formed, and even if they were unacquainted with and had no knowledge of the activities of all the remaining persons who also might be acting to aid the purposes of the conspiracy. The indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these

3480 persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

It is necessary, however, that such person who is to be held to be a member of a conspiracy should have knowledge

of the unlawful purpose sought to be accomplished and should intend to be acting with other persons in the accomplishment of this unlawful purpose. However, it is not necessary that all of the persons taking part in a conspiracy should play parts of equal importance or activity. Anyone who acts with others in the accomplishment of an unlawful purpose, knowing it to be unlawful, or fraudulent purpose, knowing it to be fraudulent, is guilty of conspiracy, whether his activities in the fraudulent purpose were great or small. It is sufficient to convict a defendant of the offense of conspiracy if he knows in a general way of the purpose of two other persons to defraud the United States and then assist in any way to accomplish the purpose, no 3482
matter how great or how small the assistance which he gives to accomplish the purpose.

The indictment sets forth that this conspiracy came into existence on September 1, 1942, and I wish to state that the date of the origin of the conspiracy is not of importance and if a conspiracy existed it is not necessary for the Government to prove that it came into being on the date named in the indictment, nor on any specific date. A conspiracy may be of gradual development, and in this case it is sufficiently proved if you believe beyond a reasonable doubt that at any time subsequent to September 1, 1942, and prior to the return of this indictment on July 12, 1945, a conspiracy existed as it has been previously defined to you.

Acts done by conspirators in furtherance of a conspiracy are called overt acts. I wish to explain to you the nature 3483
of an overt act and the part it plays in the prosecution for conspiracy. Conspiracy is punishable as an offense under the statute I have previously referred to, only if an agreement or understanding has been formed to defraud the United States, followed by some step known as an overt act taken to carry out the proposed scheme. The law recognizes that persons might have an agreement or understanding to engage in a criminal activity, but they might repeat

of that decision or for some reason abandon it without taking any step to commit the offense, and in such case they would not be guilty of the crime of conspiracy. If, however, having entered into an agreement or understanding to defraud the United States, they take any step or commit any act toward the completion of the offense, thereby evidencing their intention to go through with the conspiracy, the offense would be complete, irrespective of whether or not the plan was finally carried through to a successful conclusion.

The overt act need not itself be of a criminal nature. It may be an act perfectly innocent in itself. But if it
3485 is an act done for the purpose of carrying out an unlawful agreement, then the crime of conspiracy has been committed and completed. Therefore, it is not necessary that overt acts shown to have been committed or steps taken in furtherance of a conspiracy are in any way criminal or forbidden in themselves, but it is necessary only to show that some act of some sort as charged in the indictment was done for the purpose of carrying out the object of the agreement previously arrived at, and when an overt act has been committed by any one member of a conspiracy, it makes all persons co-conspirators who participate in the unlawful agreement with knowledge of its unlawful nature, whether they were original parties to it or whether they came into it at a later time. It is not necessary that the Government prove the commission of
3486 all the overt acts charged in the indictment. If the commission of any one of these overt acts be proved beyond a reasonable doubt that is sufficient.

Now I think that covers everything I said to you this morning on the subject of conspiracy as such.

Is there anything about which I have read to you which is not clear to anybody, or which you would like to have amplified in any way? Or have you any questions on any

phase of the case, any of you, which you would like to ask now?

Juror No. 6: Yes. In reference to Mr. McGohey's summation, several of the jurors would like to hear again that part in which he connects certain telegrams and meetings and messages of the defendants to the dates of November 22nd, and 24th and 25th of 1943.

The Court: I still think, sir—I want to give you all the assistance I can, I want to give you all the assistance I can, but I don't believe it will be proper to read from the summation or argument of any one counsel without reading all of them in full and I do not imagine you want that done. 3488

Now is there anything further, ladies and gentlemen? Did you have some suggestion? There is nothing else you have in mind then? Did something else occur to you, sir?

Juror No. 6: No, that was the only thing. That was just a few paragraphs and it would have contained so much testimony.

The Court: Well, it is not a question of the practicability of it. What I have in mind is that I do not think it would be fair to read a quotation or excerpt from the summation of one person without comment from the other counsel, which I would not know exactly where to find. I think that most of your have pretty well in mind what the summation was, and I would like to comply with your request, but I don't believe I can do so. 3489

All right, ladies and gentlemen. I will ask you to retire to your room and resume your deliberations.

(Jury again retired at 4:12 P. M.)

Mr. Robb: If your Honor please, we had certain exceptions to the portion of the charge which your Honor reread. I assume that your Honor will let us take those again and renew those.

If the Court please, in view of what has happened at this time, I ask the Court to instruct the jury that Mr. McGohey's summation is not evidence, is not to be considered as such. I gathered from the remark of one of the jurors that he seemed to treat that as testimony. He referred to it as testimony. He said it contained so much testimony.

The Court: I did not so understand. I understood the gentleman to say that the particular portion which he referred to—he may have used the word "contained"——

Mr. Robb: Yes, sir.

The Court: What I gathered from him was that it summarized and gathered together certain testimony.

3491 Mr. Robb: I am quite sure he used the expression, "contained so much testimony".

The Court: All right, I will consider that.

Mr. Cohen: May I make the same objections that Mr. Robb has made and renew the objections made by Mr. Keenan to your charge in the main?

The Court: Very well, it may be so noted.

What has the Government to say? Frankly, that request I have never had before and have never heard of.

Mr. McGohey: Neither have I, your Honor.

The Court: What comment have you to make, if any?

Mr. McGohey: I think your Honor means the request to read the summation. If I understand your question, you wanted me to indicate what I had to say about the re-

3492 quest to read the summation?

The Court: Well, I didn't——

Mr. McGohey: I make no question about that. I don't know how you could do it without reading all of them, and I don't know whether the others have been transcribed.

The Court: Well, I don't either, and I would not, unless urgently requested, direct that all summations be read; and, as I said, the request made was entirely a novel one

to me, but I thought that it would not be fair nor proper to permit the reading of an excerpt of one counsel.

Mr. McGohey: I don't quarrel with your Honor's ruling on that at all.

The Court: All right.

Mr. Ansell: If the Court please, and with all proper respect, of course, we feel that the procedure over-emphasizes in this case that part of the charge having to do with the elements of conspiracy, and puts them out of a fair relationship to other parts of the charge which, it would seem to me, they necessarily pertain to. And I would like to have an exception to the procedure itself.

Mr. Cohen: Your Honor will accord me the same exception? 3494

The Court: Very well. Yes. I am inclined, if you seriously urge the matter about the District Attorneys——

Mr. Robb: I do, sir.

The Court: I expect you had better get them back.

Mr. McGohey: That is, the point to instruct them that the summations——

The Court: Are not evidence.

Mr. Rudykoff: Maybe we could have the stenographer read what Juror No. 6 said.

(Record read.)

The Court: I still don't think that your apprehension is well founded, but I would rather make it clear to the jury in case they should be——

Mr. Ansell: We join in that, too, your Honor, for the reason that, rightly or wrongly, it seems to me that the jury does regard the statement made by Mr. McGohey as testimony. 3495

Mr. McGohey: I don't believe there is any basis for that, your Honor, and I call your Honor's attention to the fact that in the summation of each of counsel I am pretty sure it was pointed out that counsel's statements were not testimony and not evidence. I am sure I did that and I am

sure that your Honor said that in his charge. However, I want to be fair, your Honor, and I won't press it.

The Court: I think our apprehensions are groundless, but I would rather correct them than to take any chance.

Bring the jury back in.

Mr. Robb: I had in mind that the jury is not bound by what Mr. McGohey said. It is their recollection of the evidence.

Mr. McGohey: I think that has been well taken care of in the charge.

The Court: I am not going to make a speech.

Mr. Robb: No. That is the thought I had in mind.

3497 Mr. McGohey: My summation has been here (indicating) and I have said that.

(The jury returned to the court room at 4:20 P. M.)

The Court: Ladies and gentlemen, after you retired it was suggested to me that the question asked by Juror No. 6, you, sir, in speaking of the United States Attorney's summation, made some reference to the evidence contained in certain portions of his summation, and it was suggested to me that possibly you or someone was under the misapprehension that summations of counsel were evidence in the case.

I think it has been made clear to you by counsel themselves, and, if not, by me, that summations of counsel are not evidence; summations of counsel undertake to summarize to you the evidence which they think important
3498 and which has a bearing on the case. That is true of all summations, but I am sure that counsel themselves have made clear to you that summations are not evidence.

Did you have any misapprehension about that part, sir?

Juror No. 6: No, sir. I just thought that it was a certain group of facts in a small—encompassed—not the right or the wrong of the facts.

The Court: I was pretty sure that neither you nor anyone else was under any misapprehension about that:

that your reference to evidence in the United States Attorney's summation meant his recital of the evidence as he recalled it and was not evidence itself.

Another Juror: May I make a suggestion that there is in the facts the fact that—this gentleman wants to know—can be found in any of the evidence, can you point it out to us in the evidence? Can you tell us where we can find that fact?

The Court: Well, now, could you be more specific about that?

The Juror: Well, the gentleman asked the question of those dates. Can those dates be found in any of the evidence that has been given to us, and can you direct us 3500
to where we can find those dates in that evidence, or those facts in the evidence that was given to us?

The Court: Those dates were referred to, as I recall it, in the evidence of a good many witnesses. For instance, the young lady from Washington, Miss Goertz, gave some testimony on those dates; Miss Solomon testified something about those dates, and there may have been——

A Juror: Melvin Usdan also testified.

The Court: That is quite true.

Mr. Ansell: What was the statement of Juror No. 4?

(Record read.)

The Court: I do not believe it would be practical for me to undertake to pick out from the evidence of the different witnesses what was said, and I am afraid you will 3501
have to rely on your recollection. As to any specific witness whose testimony you would like to have read I will undertake to have it read to you, but I do not believe it would be practical to go through the entire record to undertake to get the separate questions and answers which have some bearing on the date.

Is there anything else, gentlemen?

Mr. Cohen: May I interrupt your Honor to say that you also called the jury's attention to the fact that those dates might be found in the definite records which you called the jury's attention to?

The Court: Yes, I mentioned that this morning. I haven't undertaken to recite to you or indicate to you what different people said because, offhand, I may have overlooked something. All right, ladies and gentlemen. I beg your pardon?

Another Juror: I don't know whether this is apropos, but in the minds of some of the jurors there appears to be a little confusion regarding the guilt of others in connec-
3503 tion with the three that are now on trial, and it seems to me perhaps it might be clarified by the Judge, perhaps, to clear their minds of the idea that—I mean, we seem to be a little confused.

The Foreman: As to whether one or three.

The Court: I beg your pardon, sir?

The Foreman: As to whether one or three.

The Court: It seems to me you have made——

A Juror: Have I made it not clear?

The Court: I think I understand what is in your mind, Madam.

The Foreman: I was just trying to help her.

The Court: All right. I thought that I had made that clear by something I had already said in my charge, but if I haven't, I will undertake to make it clearer.

3504 The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them,

are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception; you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only.

3506

All right, you may retire to your room then.

(Jury again retired at 4:27 p. m.)

Mr. Robb: If your Honor please, with all respect, we except to your Honor's discussion with the jury of the evidence——

The Court: Of what?

Mr. Robb: We except to your Honor's statement to the jury concerning what the evidence, or, rather, what the witnesses had testified about a particular point, upon the ground that your Honor in so doing took part in the jury's functions and undertook to tell the jury what the evidence was, which is their function, of course, and not the Court's.

We submit also that your Honor's remarks in that connection constituted argument.

We also, if the Court please, except to your Honor's statement as to the possible bearing upon this case of the guilt or innocence of any others inasmuch as the indictment in this case charges "others to the grand jury unknown." We submit the jury upon the evidence might possibly convict only one of these defendants and acquit two of them.

3507

The Court: I stated that to them this morning.

Mr. Robb: If the Court please, I think that I asked your Honor so to charge and your Honor said no, your Honor

would not charge that way. Your Honor charged they might convict two and acquit one, but did not charge that they might acquit two and convict one.

Mr. Cohen: Now, your Honor——

The Court: All right.

Mr. Cohen: Your Honor will recall that after the jury first was sent out by you, at the request of Mr. Keenan they were recalled and you spoke to them about the telephone calls, and you stated to them that while there was evidence that a telephone call was made to Washington and one came in from Washington, there was no evidence as to who made the call from Washington. Your Honor will recall that.

3509 The Court: I recall saying that there was no evidence on the record.

Mr. Cohen: Yes. Now, since that time, of course we were unable to get the evidence together because we did not know that Mr. McGohey was going to make a point of it on the trial, and he made it only in his summation, we have gotten the record of the telephone company, showing that the call from Washington to New York was made by Captain Radovich. And we ask for leave to put in that evidence in the light of Mr. McGohey's statement to the jury and in view, further, of the statement made by the jury to your Honor for further information concerning those dates. This is highly important and of great importance to the defendants here.

The Court: What is that you have in your hand?

3510 Mr. Cohen: This is the telephone company slip which we only got after the matter was submitted to the jury. I think it is highly important in view of the statements made by the jury to your Honor.

The Court: Have you seen this, Mr. McGohey?

Mr. McGohey: No, I have not, your Honor.

Mr. Robb: We haven't either.

Mr. Ansell: Would your Honor hear us one moment please.

The Court: Yes.

Mr. Ansell: We think the whole idea of putting evidence in the record by the method pursued this morning is irregular and prejudicial to the defendant Radovich, and we think to go further with it by means of stipulation between the United States and Mr. Keenan's clients would be highly prejudicial to Radovich and could not be done by stipulation, and would involve the opening up of that question and permitting us to cross-examine upon everything that is brought out. We don't believe your Honor that there should be an injection of facts into this record in any such way.

Mr. Cohen: Evidently, your Honor——

The Court: I want to hear from the Government first. 3512

Mr. McGohey: Your Honor, may I see that? Have we got those telephone calls that were in here this morning?

The Court: I gave them back to Mr. Flynn or Mr. Wallace this morning.

Mr. McGohey: Because it is my recollection that there was an Arlington call, and that is what this appears to be, as distinguished from Washington.

Mr. Cohen: Arlington is Washington.

Mr. McGohey: We talked this morning about two calls, one from Washington and one to Washington.

The Court: That is right.

Mr. McGohey: Until I see the records, I don't know whether that is so or not.

The Court: I do recall very distinctly that the record which was produced this morning, that is, the telephone bill, 3513 referred to the two calls, New York to Washington and Washington to New York, a collect call from Washington, Col. parenthesis New York.

Mr. McGohey: Your Honor, but this is not Washington. This says on its face, Arlington, Virginia, and that undoubtedly is the way that would be reported on a telephone company bill.

Mr. Cohen: No, it would not.

Mr. McGohey: Well, wait until we see, when the bill comes in. That is the first point. The second point, your Honor, is that I don't understand on this argument that they didn't have any time to get it. They had three weeks since this trial started and they certainly had the time since Miss Goertz testified about the dates to get it. And the evidence that Miss Goertz gave, and the argument that I made from that, your Honor, isn't going to be disproved by this or any part of it at all. All this is going to prove is that a telephone call was made from Washington. It is not going to prove that Radovich didn't make that telephone call from Goldsboro, and it is not going to prove that
3515 Radovich didn't on that day, the 24th, ask to have those orders made. It is not going to disprove that on the 25th the letter was sent from the Army Air Forces in Washington to Seymour Johnson Field to have the boys transferred out. It is entirely collateral, and certainly at this time, when the jury has been considering the case now since eleven o'clock, I certainly don't think there is any justification for opening the case to go into such a collateral matter, and I will oppose it.

Mr. Cohen: Evidently the matter is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6, and the matter—the whole thing was engendered by Mr. McGohey's argument in his summation before the jury.

Mr. McGohey: Based on the evidence of course, your
3516 Honor.

Mr. Cohen: But you raised the point, on the question of doubt, as to whether or not this thing took place at all. There never was any question up to that time.

Mr. McGohey: That doesn't——

Mr. Cohen: Evidently it created a doubt in the minds of the jury.

Mr. McGohey: This evidence would not disprove it because all this evidence would show that he made a call from Arlington, Virginia, to New York some time that day.

The Court: Gentlemen, I am not going to admit the evidence for a number of reasons. In the first place, there is no witness called to prove anything. In the second place, this memorandum refers to an Arlington call; a call about which I made a statement this morning was a Washington call. I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive.

Mr. Cohen: But——

The Court: Sir, I have ruled, and I am just explaining. 3518
But the most cogent reason in my mind is that the case has long since been closed. As General Ansell very aptly remarked, my procedure at the beginning of this morning was irregular to say the least, and I am not going to make it more irregular by calling in the jury at twenty-five minutes to five, when they have been considering the case since approximately eleven o'clock, and make some statement by way of evidence to them, or permit the statement of counsel, or the handing to them of an unverified memorandum from the telephone company. In my opinion, to inject any evidence or bit of evidence at this time would unduly emphasize it and give other counsel the right to put in other evidence, and call for somebody to cross-examine, and I just am not going to permit that.

Mr. Cohen: May I with all due respect then, besides tak- 3519
ing my exception to your Honor's ruling, now make a motion for the withdrawal of a juror and for the declaration of a mistrial and for a new trial on this evidence which we have found since the close of the trial or submission to the jury, and which we were unable to obtain prior to the opening of this trial.

The Court: Very well. The motion will be overruled.

Mr. Cohen: Exception.

Mr. McGohey: There isn't any evidence that they were unable to obtain it, your Honor.

The Court: All right. The court will take a recess.

Mr. Ansell: Would your Honor hear me one moment?

The Court: Certainly.

Mr. Ansell: I am quite certain that you know I would not make this suggestion, perhaps a motion it should be labeled, to your Honor, unless I were convinced that there is confusion in the minds of the jury as evidenced by certain requests made by one or perhaps more of the jurors upon this subject, as to whether or not the jury might acquit two of the named co-defendants and convict one.
3521 Your Honor's charge this morning, I wish to say with frankness, and it is not surprising, I think was confusing to me and I think it is not surprising because I had difficulty in hearing—your Honor's charge in effect as I remember it, was that testimony with reference to "persons to the grand jury unknown" could be used only to throw light upon the issues that were before this jury. It seems to me that your Honor's charge and the statement made to the jury in honor of their request here, was to tell them in effect that they could not convict one of the named defendants, if they found him conspiring with one or more persons to the jury unknown. That I wish to say, your Honor, was not my view of the law of the matter.

I regret that I have taken up this much time and I hope—

The Court: Oh, have no regret, sir. What I said is this,
3522 the indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these persons, or any of them, or any of the persons who have testified as witnesses were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participa-

tion may bear upon the weight or credibility of their evidence.

Your views still stand after hearing that read?

Mr. Ansell: I regret it is so, your Honor, because it seems to me to preclude their finding one man guilty of having conspired with persons to the grand jury unknown. It seems so to me or I should not make the statement that I think it does, when coupled with your charge upon the possible verdict that could be given. I think your Honor is clear enough about the law. The only question that I am making is whether or not your Honor made himself clear in addressing the jury, and I thought then that it might be a matter of asking, and I just sense that it is one, perhaps, of importance now. 3524

The Court: What is your thought on that matter, Mr. McGohey?

Mr. McGohey: I am afraid, your Honor, I did not follow that last part, I was just talking to Mr. Rudykoff here.

The Court: Suppose you read to him what Mr. Ansell said.

(Record read.)

Mr. McGohey: I am afraid I just don't understand the argument as it has been made. I can't comment intelligently on it.

Mr. Rudykoff: If anything, it would be of an advantage to the defendant Radovich rather than a detriment.

The Court: Treating your suggestion as a motion, gentlemen, I am going to overrule it. 3525

Mr. Robb: May we have an exception, your Honor?

The Court: Yes.

(The Court recess from 6:10 P. M. to 7:30 P. M.)

(The jury returned at 9:02 P. M.)

3526

VERDICT.

The Clerk: Will the jurors kindly answer as your names are called. (Roll called.)

Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you?

The Foreman: We find them guilty, with the highest degree of clemency for all three defendants.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded: You say you find each and all of the defendants guilty with a recommendation for clemency, and so say you all.

3527 Mr. Ansell: If your Honor please, may we have the jury polled?

(Jury polled.)

The Court: Ladies and gentlemen of the jury, I want to thank you for your patient and careful attention which you have given to the trial of this case, which has been long and at times tedious. And I now discharge you from further consideration of this case with the thanks of the Court.

(Jury discharged.)

The Court: What is your desire, gentlemen of counsel, about the matter of sentence, that is, the matter of when to pass on it? What is your desire, counsel—Mr. Keenan?

Mr. Keenan: Your Honor, I am not ready to make any request for any specified time, but if the Court has a
3528 notion in mind to deny bail to the defendants, I would ask to have sentence deferred to another time.

The Court: I did not hear you, sir.

Mr. Keenan: If the Court is of the opinion that no bail should be permitted for these defendants that I represent, I would like to have the sentence deferred until a later time where that situation could be met. Other than that I would ask the Court—would move the Court that sentence be not imposed immediately.

3529

The Court: Do you gentlemen insist that it be taken up tonight? I think it has been a long trying day and I prefer not to take up that matter at this moment.

Mr. Ansell: Pardon me, your Honor.

The Court: Yes, sir.

Mr. Ansell: I don't know what the procedure is here. It is late in the nighttime, the day has been a hard one. My client, without money, your Honor, has been found guilty. He is here. He is still an Army officer. I don't know what the practice is. I don't know that the practice fits this case of my client. The United States Attorney is here. I can only say, I hope and I will believe that it would be very harsh to commit Major Radovich tonight.

3530

The Court: I have no idea of ordering that. I have no idea that the United States Attorney would suggest it. I am inclined to continue the whole matter, adjourn the whole matter until tomorrow morning. Is there any objection to taking up the matter of sentence at 10 o'clock tomorrow morning?

Mr. Ansell: No objection on my part, sir. Indeed, I would like to get it over and find out where we are.

The Court: All right, sir.

Mr. Keenan: Your Honor, if the delay is to be only until the morning, my clients would rather have the matter passed on tonight, and I think perhaps General Ansell, I don't know. He speaks for himself.

Mr. Ansell: I think I could not. I am unable to think on the subject at the present time, your Honor.

3531

The Court: Frankly, I am really tired and I haven't got the patience that I ought to have to take up a matter as important as this is. Bail is continued and the whole matter is adjourned until 10 o'clock tomorrow morning in this room.

Mr. Ansell: Thank you, sir.

(Adjourned until Wednesday, October 24th, 1945, at 10 A. M.)

New York, October 24, 1945, 10 A. M.

(Met pursuant to adjournment.)

The Court: Are you ready to proceed, gentlemen?

Mr. Ansell: I am ready, your Honor.

Mr. McGohey: The Government is ready.

The Court: All right, sir. Let me hear from the Government first.

Mr. McGohey: May it please the Court, I am sure that so soon after the verdict in this case and after this long trial, it is not necessary for me to review to your Honor any of the facts which were proven here on the trial. I think they are pretty well fresh in your Honor's mind.

3533 The jury has rendered its verdict of guilty as to each of these defendants, and the Government is prepared to make recommendations if your Honor cares to hear them on the question of sentence.

The Court: All right, sir.

Mr. McGohey: Now in view of the evidence in the case, your Honor, I would have recommended for the defendant Samuel Bayer the maximum sentence of two years in jail and a fine of $10,000. However, the jury considered the case for a long time yesterday and they came back last night and recommended the highest leniency, the expression I think the foreman used, and taking that into consideration I decided to reduce the recommendation which ordinarily I would have made to a recommendation that Samuel

3534 Bayer be sentenced to a jail term of eighteen months, and that a fine of $10,000 be imposed upon him.

Now, as to Elias Bayer, without——

The Court: Let me correct your phraseology. Not jail, it is an institution provided by the Government. I assume that you mean——

Mr. McGohey: I accept your Honor's correction and that is what I should have said.

Now as to Elias Bayer I would have recommended if the jury had not recommended clemency, commitment to an institution of the Government for a term of eighteen months and the imposition of a fine of $10,000. However, in view of the jury's recommendation, I now recommend to your Honor confinement for Elias Bayer in such institution for a period of a year and a day, and the imposition of a fine of $10,000.

As to the defendant Radovich, I recommend as to him, taking into consideration the jury's recommendation for clemency, confinement in an institution provided by the Government for a term of one year and a day, and no fine.

The Court: Let me make an inquiry of you. I gathered 3536
from some document or some statement that the defendant Radovich had paid into the Treasury of the United States already, $7,000; is that correct or not?

Mr. McGohey: I think it was not to the Treasury of the United States, your Honor. My information from the Army officials is that he paid back $7,000 to the Army, and I think it went into the Army Relief Fund.

The Court: Anyhow, it has been paid by him to some agency of the Government?

Mr. McGohey: Yes, sir.

The Court: What is your recommendation again as to the defendant Radovich?

Mr. McGohey: Confinement in an institution for a year and a day.

The Court: And no fine? 3537

Mr. McGohey: And no fine.

The Court: Is that all you wish to say?

Mr. McGohey: That is all I have to say at this time.

The Court: Gentlemen, I will hear from counsel for the defendant Radovich.

Mr. Ansell: If your Honor please, I have slept none, I am in poor shape, so if I wander afield your Honor will, of course, restrict me.

The Court: No, sir, I shall not restrict you. You can wander anywhere you want to, sir. I will be glad to hear what you have to say.

Mr. Ansell: The jury has convicted these three defendants. I am not used to criminal practice. It is evident to me that the jury fought among themselves to the conclusion that they finally reached. There is no verdict that will ever cause me to quarrel with a jury. That verdict was accompanied by what is to me a most remarkable recommendation for clemency. Your Honor remembers it.

I said to that jury and I said to your Honor and everybody else connected with this trial, I have the utmost appre-
3539 ciation of the kindness, the courtesy, the fair dealing under the law, and nothing will ever cause me to say otherwise.

It has been said to me by my best friends, in church, in professional circles, in social circles, "Why are you defending such a man?" They prejudged his guilt, I didn't, and I won't until the highest court in this land says so. Of course, he is guilty here now.

Your Honor, we have had mention made of Jews here and Catholics and Yugoslays, and the Lord only knows what all. We are Americans first, last, all the time, and this is an American court in accordance with its highest traditions. I am a part of it and I shall endeavor to demean myself with all the courtesy and decorum that any officer of the court ought to demean himself with. But I said to this jury, and I repeat it to your Honor, there were voices in
3540 me that I thought had long ago fled when this boy was sent to me by New York attorneys, friends of mine, with the request that I serve him to the limit of whatever ability that I have, and those voices arose, they called to me, and I came. And I did my best. I lost.

I don't want to enter into much personality as to myself. I feel it my duty to do so. In Eastern North Carolina I was born, in an humble home, with people who had

been there then for nigh onto 300 years. They fought, even in the Civil War, for what they believed to be right. I worship their very memory to this day.

I had a father, a poor man, not well educated except as he did it himself. One of the greatest characters ever known to me, and I pray God that I inherited something from him, was an intense sense of justice coupled with an insurmountable courage. For fifty-six years the people first of that district and then of the county, honored him by making him Clerk of the Superior Court, fifty-six years. I am certain he never asked a man to vote for him in all his life.

In my little bedroom there was a placard, written in the beautiful hand that he could write, and on that was written "Be true and fear not." That was his commandment to me. And that commandment I shall obey just as long as I draw the breath of life, regardless of who is on the other side. 3542

I had read it before, but last night I went back and read this from the Bible: "My Son, keep Thy Father's Commandments. Let it ever be about thy neck and bind it ever around thy heart." And later on it says: "Where thou goest, thy Father's commandment shall lead thee. When thou sleepest it shall keep thee. When thou wakest it shall talk with thee."

I am no different now from what I ever was. There is no power on this earth, and I am not a formally religious man, that will keep me from taking to my God my troubles, in my own Episcopal Church, in that Catholic Church over there, if there were a Jewish Synagogue I would go there. And last Friday night I went back to West Point. I knew that we were up against it. I went to the old chapel where I worshiped as a cadet, and I love it, and I asked that whatever happened here, let me play my part courteously, amiably, but courageously and truthfully. 3543

I went to the old house that I was married in, my children were born in, that looks down on the cemetery, and the

cemetery looks down on that most glorious of this world's rivers, and the river runs up to Vassar College, where my womenfolk were educated and lived, and I came back here quarreling with nobody, abusing nobody, but attempting to do what was true and right.

Of course the money has been paid back. Of course we must assume, because it is fixed in the law, that Radovich got it. I don't believe at the end it will ever be found that Radovich was guilty of moral wrong, and that statement I make to your Honor; it is all not here.

Your Honor knows that I served in the Army many years and your Honor knows that I loved, and I do yet
3545 love, the Army of the United States, and I shall ever love it. I know that my views of the methods of arriving at punishment in the Army were not the views of my own West Point classmates—they were not then, they are not now; and yet as the years have gone by and judgment has been softened, I have been proud to receive the decorations of respect and esteem and love from every officer of the Army who served in the Army, either at West Point or thereafter, with me. It is a great pride and pleasure, your Honor, thus to end out my days. I love any man who serves, and serves courageously, in the Army of the United States, and they can put prison stripes on him, as the law of the land requires, but my arms will be around that man just as long as I live and he lives.

Of course attorneys can't agree with the judges; of
3546 course not. So with opposing counsel. Of course not. But fairness, honesty of judgment, rectitude of official performance, I have known that it was here. I know it.

Now I think there are questions here that ought to go, and that will go, to the upper court. I have not believed that Radovich's confessions were free. I have believed, indeed I know, that this part of the Army of the United States coerced and maltreated Radovich and they ought not to have done it, and they violated the new Articles of War that I

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for one labored so hard to change, to prevent that very thing. It seems to me that the Army—I assume for reasons that I shall never be able to understand, except I know that if you give a certain kind of man enough rank and enough power you had better keep the check rein on him. Not all, far from it. I have never known, your Honor, why they imprisoned Radovich as they did, and I feel intensely about it. I have never known why the military authorities, after he had done all that he did, at General Hunter's request had been brought from the Pacific Coast and thrust into that ward for the insane.

I have never known, I can't comprehend, any set of men with the slightest sense of responsibility for their duties as 3548
high ranking officers of the Army, could have convened a court-martial and tried him for what is in every practical respect—your Honor says not—legal, and for the time being, of course, I defer to that, convened a court-martial upon this man.

And I wrote to the President of the United States as good a letter as I could compose, because he is the Commander-in-Chief, and I said to him: The court-martial was a kangaroo court. It can never stand up. There is law in this land. I know you can't attend to these things, I know that the Secretary of War can't. I don't know what the Judge Advocate General will do; I think I know. But, Mr. President, can't you take some simple soul without servility to the department, any of them, and ask him to find the truth of all that happened to Radovich out there. 3549

That was July 28th or 29th. August, September, almost three months have passed away, and yesterday when I get to my hotel I get a letter, a nice formal letter that gets us nowhere. And they send an inspector-general of General Hunter's department to investigate why General Hunter violated the law in bringing this man to trial. And he reported, your Honor—reported—Ansell. Ansell, why he was a queer duck even in the last war. Queer duck. Be-

cause more than a hundred thousand men were released from penitentiaries, prisons and military prisons, by Secretary of War Baker upon my insistent recommendation. Queer duck.

Secretary Baker—and your Honor was in the Army and Mr. McGohey and Mr. Keenan, we all were in doing our best—stood by me, except when men whose sentences they had approved were not being executed, and they mustered their forces upon me, and it went to Congress. It turned out that Congress was on my side—the committees I mean—and they were about to criticize the Secretary of War. I would not have had it so. But the Secretary paid to me
3551 a bit lefthanded but nevertheless a glowing compliment, "You have to remember that General Ansell is a man who has a passion for military justice."

This was the first time that I had ever encountered a ruthless violation of the Articles of War that the Congress of that day made to prevent some of the injustices of the land.

Punishment. I think those of us who served with the regular Army esteem it as highly as I, but I think also we must know that when we encounter a man like that, a man like General Hunter, things like that can happen, and that attitude goes down to his military minions, and a man who has not been tried, a man who has not even been charged, but thrown into the insane ward, that man is a pariah, he can't be spoken to, he can't be regarded as an officer of
3552 the Army; he is degraded and humiliated in accordance with some of the military law that has governed the Continent of Europe but not of England and our land.

That man has been punished since the 9th of 10th day of August, 1944, punished by humiliating, harsh, cutting treatment.

Now I wanted to confer with him but they said, well, you come up here. He was in the jug then. They would not let him come to me. I can understand that. But nothing

was done ever to permit him to get in touch with me, an old man. Applications for request for a few days' leave were denied. I had to come to Mitchel Field even to confer with him, and go through all the folderol that one has to go through to get on a military post of the United States.

Born as I was, I never saw, your Honor, a man with a foreign name, what I call a foreign name, in my county. I never saw an Irishman in my county; I never saw a Catholic in my county; I never saw a Jew in my county unless he were a peddler. There was never but one foreign-born man in my county, and he was an Englishman. This boy here (indicating Major Radovich) came from foreign parentage, Yugoslavian parentage. He was born in this land. 3554
He is an American. He loved this land, he fought for it. I see no difference myself; my regard for this Government, for the Constitution, for our place in this world, won't permit me to distinguish between those of foreign racial extraction and myself.

I had a good military record, but with all this boy's faults, so help me Heaven, I would be proud to change places with him and go down if need be. That boy's name, in my opinion, is placed like a great star in the crown that marks the place of this nation in God's Heaven.

I think the military authorities were not only unjust but they were stupid. He is here to be punished by your Honor, and I know, I know what a distasteful job that is to your Honor. I know that. Your Honor's duty of course will be done, and I could not and would not deflect you from it. 3555
Government, right, justice, truth, do not lie in any such direction as that. I am here, your Honor—after all the motion shall be made, new trial, and all this and that, I am here pleading as earnestly as I can for the probation of this man, whatever sentence you may pass upon him.

It was Chief Justice Taft, in passing upon our probation law, a glorious law, your Honor—like all other law with some abuses—that the object of that statute was to

take a man of hitherto good character, a convict, I mean, who had done well up to this moment, who had served his country well, who had the elements of the making of manhood in him, to take him and pluck him, like a brand from the burning, and that I think is the Chief Justice's words. And this man has all of that. When we are through with this, then we are going to face a court-martial. In God's name when will this Government that we love so much stop? When I say "government" I don't mean the great United States and its institutions; I mean the personnel of the Government. When will they stop?

I say that whatever your Honor may do, this boy should
3557 be turned back to the Army of the United States, whence he came to Mr. McGohey here under orders, and turn him back with the proper restrictions upon parole and probation and all of this, with which I am not familiar, and let the Army of the United States do whatever it thinks it ought to do. And I will be there again with this boy, and I am going to stay with him wherever he is before every tribunal until the very end.

Now I have said, your Honor, all that I can say. I am deeply moved by it all. I don't want to see him with stripes on him as yet at least. I think it would be a disgrace to the Government rather than to him, to put him there. I would like to see Mr. McGohey, for whom I have a high regard, and I think your Honor has noticed it—and I did not have it when I came here; I have it now—I hope he will join
3558 with me in attempting to enlighten your Honor to the point where the Government's interest will not be served and justice will not be served, by treating this man as we have to treat some, as a common, ordinary criminal, a safe blower, a bank robber, a gangster. We know we have that criminal type and we know that they have to be handled.

May God spare me, your Honor, to plead with you in this last sentence to do your best. I know your Honor and the land, the part of it from which you came: a good

lawyer, a feeling heart, a just judge; see, see that this boy is given a good break, and turn him over to the military authorities, where in Washington I can still fight for him, and if at the end they say he must be put in prison stripes, I shall have to defer to that, but I shall put my arms around him even then.

Mr. Keenan: Your Honor, I would make it very clear at the outset that whatever I have to say with reference to Samuel Bayer or Elias Bayer, that I don't come before your Honor with any bowed head or with my head even tilted a little bit, or to beg for mercy or pity. Whatever I shall say will be addressed with whatever humble powers I have, to the honest and fair discretion of this Court, what I be- 3560
lieve is the complete and entire fulfillment of the law.

Now the distinguished former Judge Advocate General for whom many times I have stated I have respect and affection, has told you of the deep personal and other interests he has of his old association in the Army, which one can well understand; and I want to state to your Honor that I am more keenly interested in this matter because of my own desire to continue my own devotion to justice in this country.

Now a case of this nature, where widespread publicity, for some reason or other, has been generated and has become somewhat of a cause celebre, it is somewhat more difficult to urge that the case be given the treatment that it should receive, stripped from all of its trappings, and it is very difficult when you are dealing with the future of a 3561
human being, his liberty, that is the next dearest thing to the things of life, and perhaps equally dear, to still feel the obligation to sustain your own notions about the administration of justice. But, nevertheless, I have respect enough for Mr. Bayer, whom I have come to know very intimately in the many, many months that I spent in the preparation for the trial of this case, and in the three weeks that we have been in this court room, to know that

he won't mind if I do not address myself entirely to his own personal selfish interest and still adhere to my own practice which I intend to follow as long as God gives me the breath of life, and that is to speak the truth and to call a spade a spade.

Now I know, your Honor, of nothing more ugly that I can conceive of than that foul and despicable tendency of visiting punishment or discriminations upon an individual because of the fact that by accident of birth he happens to be of a certain nationality or race or religious persuasion. Whatever happened to your Honor and myself in that regard, we had very little or nothing to do with it, in most
3563 instances, excepting our religion, we had nothing to do with it. So when one considers the matter way down at the base, it is about the most important thing there is in this whole life that we live. Now your Honor will notice that in the trial of this cause the matter which I am going to speak about I adverted to only for a moment and said with a great deal of reluctance, because I can remember back in 1937, when I flew out to the Orient, we stopped over at the Island of Midway and had a good swim, and the next place we went was Wake Island; it was very warm, it was tropical country, and I jumped in the water, and the first thing you know I got close to some of those mammals, and the feeling, the creepy feeling I had of slime around my body is the same feeling that I have when I see the manifestation of this ugly, wretched, wicked thing that every-
3564 body in this court room knows what I am talking about.

The Court: Well, I don't.

Mr. Keenan: Well, I do. Then I will make it very plain.

The Court: I would like you to be specific.

Mr. Keenan: This whole unfortunate Greek tragedy started off with racial prejudice. It started off, as we get the statement from Captain Radovich, with a conversation that he had with Captain Pepper. Captain Pepper told

him that these boys would have to be transferred, he thought, that there was a good deal of talk going around the camp. I have no desire at this time to review the evidence of something that took three weeks, almost, for the Government to present, step by step, but I think your Honor will agree with me that there was nothing of any consequence occurred that ever would have brought about any particular notice had it not been for the transfer of these boys to the hospital unit at Mitchel Field, the first transfer that anything could be said to have an aroma of any influence that was wrongful. 3565

Now, Captain Pepper, your Honor, an officer who wore the uniform of our country, on the witness stand, was asked the question not by me but he was asked a question by counsel for Captain Radovich: "Isn't it true that you said to Captain Radovich that you wanted to get rid of these boys because they irritated you because they were Jews?" I didn't bring that in, your Honor, neither obliquely nor directly. And instead of the captain, in a court room, openly stating "Why certainly not, such a thought would never come to my mind," his answer was, he didn't remember saying it, but he would not deny it; and he made the amazing admission afterwards that he did not carry his prejudices around with him openly. That is the testimony in this case. 3566

The Court: I recall that. But how do you attribute the investigation and the prosecution to Captain Pepper, who himself plead guilty to a participation in it in a way? 3567

Mr. Keenan: I believe he did not, your Honor. In the first place, we have nothing in the record except what Captain Pepper said on that subject, and Captain Pepper, in the presence of this Court, committed open and unadulterated perjury when he denied that court-martial proceedings had been leveled against him in the Army, and a very few moments later when a document was brought to his attention in which that appeared, he said, "Oh, yes, I

was court-martialed, or charges were preferred against me for the 95th and 96th Articles of War"—the most heinous—"Oh, I forgot about it and I don't know, I didn't know that you had—I didn't know about this statement." Well, so much for that, your Honor.

No, the investigation did not start from that. I said that, your Honor. I said that the Greek tragedy started there. Because the investigation is not of the import that the facts themselves are, and the fact is that there never would have been a case here at all if it had not been for Captain Radovich deciding to take these two boys and move them from a position where they were doing an
3569 honorable, lawful duty in the United States Army. But, however, if the matter stopped then I would not be so much concerned, and I think I never would have adverted to it.

And the second thing is a matter, with great respect to your Honor, that your Honor has not seen eye to eye with me, and I am afraid I became quite unintentionally a little bit offensive to your Honor, for which I want to apologize and take this opportunity to do so, but I do think that nothing could be more prejudicial than to set forth in an indictment a charge that Samuel Bayer was a criminal type, a furtive criminal who used one name at one time and one at another. Your Honor knows full well why the term "alias" is put in an indictment. It is to cause a jury to believe that it has to deal with a confidence man, a slick man
3570 who uses one name at one time and one at another, so that he can indulge in his frauds without detection.

Now, your Honor, I think with some misfortune to the defendants adverted to the fact that Bayarsky was put in there, as I understood your Honor, and I did not hear you very well, and stated it, to designate his Russian nationality or pre-nationality, at least the word Russian was used, and it had—I am not now saying about your Honor's remark—but if that was the purpose it certainly had no busi-

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ness whatsoever in an indictment filed by an American prosecutor in an American court.

Now that was not all, your Honor. Let us come to the meat of the cocoanut again—you have asked the question of me—and the next thing is a question asked by Mr. Robb, counsel for Captain Radovich, standing where I am standing now, a very few days ago, with the witness on the stand who prepared the Government's case, who took the statements from Radovich, a representative of an honored institution for which I hold the highest respect and which I am sure holds no such views or identities or indulges in in any such practices—he was asked the question, this man on the witness stand, by Mr. Robb, with Major Radovich 3572
standing a few feet away from him when he asked the question, "Isn't it a fact that you said to Major Radovich that you were not trying to get him, you were trying to get these two Jews?"

I didn't ask that question, your Honor, I am certain that there is no jury here—your Honor has seen enough of Roger Robb in this court room to know that he never would have asked that question before a jury of a man representative of the Government investigating agency if he hadn't been so told that that remark was made to him by Major Radovich himself. I am not indulging, your Honor, in wild speculation.

Now, if that was all, your Honor, I think I would have kept silent on the subject. But last night in this court room was the culmination or the semi-culmination of a 3573
Greek tragedy, where disgraceful transactions appeared in the jury room and where references to races and religion were the paramount subjects of conversation, and that wasn't all, your Honor. But one of the jurors, I am dependably informed, was excused, one of the spare jurors, without knowledge of your Honor, because he didn't want to come back after an altercation, where another member of the jury had been insulted on the subject matter of

race or religion, where she wanted to appeal to your Honor in the latter days of this trial and was dissuaded by the remarks of one of the attendants from coming up to see you and give you the real reason why the juror did not return and ask to be excused.

The Court: Do you mean the alternate juror?

Mr. Keenan: I do, the one that you excused, your Honor, first.

The Court: The alternate was excused by reason of a telephone call to me from her husband, saying that she was too ill to come to court that day, and it is my recollection that you and other counsel were in chambers when I got
3575 that telephone call.

Mr. Keenan: I was in the room when that call came through. Of course I don't know what was said, nor did I ask any questions, naturally. I am stating, on my honor, as a lawyer, the information that has come to me from one of the jurors unsolicited, it did last night, about what happened.

The Court: I am only stating my own information about the reason I excused the juror. What you say is entirely new and novel to me.

Mr. Keenan: Your Honor, I would understand that.

The Court: I would like you and other counsel interested to know that the reason, the actual reason, the lady was excused, was by reason of the telephone call to me from her husband saying that she was too ill to attend
3576 to court. Whether that was not the real reason, I am not prepared to say.

Mr. Keenan: I am stating to your Honor that that information came to me. And, further, that there were persistent efforts to obtain a guilty verdict on the part of juror No. 2, who brought up also the same question, accusing one of the jurors of voting for this because of the race and religion; and that juror today is interested enough

to come into this court room, to be present at the kill right now.

Now, your Honor, I can't help stating those things. I don't believe it makes a softer road in life for my client, because these statements are not matters of other than the greatest importance, but I am starting that in an American court room we should have trials free from any such influence, and the case should be tried and heard upon the facts and the facts alone.

Now, your Honor, with reference to Samuel Bayer. The evidence is very clear that, regardless of any misconception, and I hope that I can indulge in that presumption with some soundness on the part of the Government, because I hope they would not try to prejudice a jury by calling a defendant a name in an indictment or using the term "alias" when they knew very well that he was a respected member of the community—I will say that this must have been one of the instances when the ordinary functions of investigative bodies were cast aside in that particular. But, in any event, Samuel Bayer has been an honored and decent member of this community all his life. We don't find the slightest trace of any complaint of the man's character whatsoever. He has been a reasonably successful business man who has complied in every particular with the law, as has his brother; his business had been conducted on honorable principles. We brought to this court room to testify as to his character, men of different walks of life who knew him well, men who were 3579
not sufficiently intimate with him that one could expect that they would shade a matter for his particular benefit.

We had Mr. Armstrong, one of the well known men of North Carolina. We had a local banker, and the agent of one of the large factor associations, private bankers in the metropolitan area. We had, entirely proper, I think, to certify to his character and attendance to his church, his rabbi. And, your Honor, I think, as I contended to the

jury, that a man's character may be something that in a superficial way attempts to inject between himself and just punishment for a wrong he has done; in many instances where the crime he has committed haven't to do with the solid basis of character—that is, the likelihood of whether it was a real heinous offense—but in this case he is charged with fraud, fraud against the Government, and when a man is called a fraud his best defense is, well, I may have done something that is not permitted by the law, but I am not a fraud; I am an honest man, have been all my life; I am no child and I have earned a position, I have earned this—as I was about to say, as Lowell said to
3581 Daly, "With souls we cringe and plot," but as poetry isn't agreeable to all our friends I will not infringe upon their sensibilities any further in that respect.

In any event, character is something your Honor that is awfully hard to build up, and very easy to tear down. And I say, when we come to the subject matter of imposing punishment, that it is certain we have all left that stage of where punishment is considered from the standpoint of vindictiveness or the kill; there is something more wholesome about it than that. I perhaps will be pardoned for saying that in my position with the Department of Justice, one of the divisions that came under my supervision was the prisons of the United States, and I had something to do with observing them and their operation; and I know that no matter how you attempt to be human to make them
3582 institutions, they can be nothing but prisons, you can't make them anything else. And unless it is necessary to take a person who is safe to keep in a community and confine him for the protection of society afterwards, it seems to me that strong thought ought to be given to exacting that penalty.

On the other hand, there is another feature, of course, in the imposition of sentences and the suppression of crime, and that is setting an example in the community.

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Now I said at the outset that I was not going to ask for any sympathy or pity. It doesn't happen to be my nature anyway, and I do not think this is a case where I would want to resort to such appeals in any event. But I do say that from the standpoint of a man being punished for any wrongdoing as an example to the community for other people not to go and do likewise, I think we should pay some attention, your Honor, and I say this with the deepest seriousness, and I hope to make some impression upon your Honor, particularly in reviewing this fact, that this case has already received widespread publicity. It has been in the magazines that are published all over the world; it has been bruited about in the metropolitan press in the earlier days, and it is well known in the defendants Bayer home community. He has three sons, your Honor. I think I might tell you and give you my professional word that he was more concerned with whether or not this case could be tried in their absence or any punishment he had to undergo during a time when they would not know about it.

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I think the greatest punishment that can be leveled upon a human being is a father who loves his children and who knows that his children love, admire and respect him, to have them know that he has been branded as a man guilty of a felony. When the jury brought in its verdict last night, an act that had been done that never could be undone, a brand had been seared, to use the language adverted to by General Ansell, upon Mr. Bayer that will remain upon him as long as he lives. Any punishment your Honor would give him by way of committing him to an institution, to make a number out of him, because of what he has done in this case, would be to heap the minor coals upon the fire that he is already suffering and has suffered for a long, long time.

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Now, your Honor, I am not unacquainted, although as I have stated, like General Ansell, I have no experience in defending criminals—this is the second time in my life that

I have been in a court room in that capacity—but I do know that it is not unusual and I think it is a matter that deserves the most careful consideration of this Court, that Samuel Bayer has been an ill man, your Honor. We offered no testimony on that point because we do not claim that he is too ill to be brought into court and tried, and we never have claimed that; though the record will show, and I know your Honor will know it was no sham, that there was on one of the sessions an occasion when he was not able to be present because he was stricken in my room on the way down in the morning with a heart attack, and for which we called the doctor, but the doctor very honestly
3587 said it was due to excitement and the like, and after he rested a day he could come back.

And the evidence shows in the case before your Honor, that came from the Government witnesses, that he is described by every witness that testified in the case, your Honor, as a man that was highly agitated; even the Government witness, Major Saffron, he being a medical man, observed his condition of agitation, that he described him almost on the verge of nervous prostration; and then the Government witness Jacobson described him as fainting or collapsing when talking over the telephone.

And at this time, your Honor, I would like to advert to one part of this case that I think has been glossed over, for which I take the blame, and that is this: the Government's theory was that defendant Samuel Bayer—I am going
3588 to speak about Elias in a moment—the defendant Samuel Bayer called Vidal and called Kogan and called Jacobson about getting this boy out of the Airborne Engineers.

Now, your Honor, I think it is important to bear in mind the uncontradicted statement that those calls all came within a brief period of time from the time he was shifted suddenly to the Airborne Engineers and that he did express—it came from Colonel Vidal: that he was quite excited, he did not understand what the Airborne

Engineers was, he thought they were going to fly up in planes and the boy had never been off the ground. And, by the way, young Usdan did state that these boys had never been off the ground when they found themselves down with the Commando Unit at Goldsboro.

Now all those calls took place within a matter of a few days. Major Saffron fixes the time as late in August and Vidal left the 26th of August to go to Colorado and never came back. And Jacobson fixed the time, and we have the telephone slip, it is of interest, to show also it was in the latter part of August. And the boys were shipped there on the 22nd day of August, if I recall correctly.

So that all those efforts upon his part which, if considered, your Honor, as being running events over a period of time to carry out a plan, would have a certain significance if you put them in the position where they are as to time, and find they were during the emotional period when these boys were first shipped—his boy who had never been off the ground and who had been ill, as I shall speak about in a moment, and it just overwhelmed the man's sensibilities. It just shocked him into an action which was not at all in keeping with his conduct during other parts of his life.

Now, in addition to that, your Honor, we have some other facts in the case. We have the fact that the Airborne Engineers was a voluntary unit, your Honor. We have a grave question whether it was alerted for overseas service or not, and it could have been so easily proved by the Government, that had access to all these records, which we did not have access to. If your Honor will consider the difficulties we had in this case, dealing mostly in war time with the War Department, which the evidence shows was none too willing to open up its files even upon an order from this honorable Court.

Now, we don't have the case before your Honor of a man who didn't want his boy to go in the service. We have no Bergdoll case in here at all. We have a case of a man who

was willing that his son should go into the service, and he had three sons; and we have one of them in Okinawa, one of them on the high seas, and the boy in question is now in Burma or in the Burma area. We have a man who had a peculiar weakness for one boy out of three.

And the undisputed evidence shows the boy had rickets, had a bent-in chest. He was not here to be observed. We don't claim that he was a cripple, we don't claim that he was an invalid, but we do say that his condition was such as to solicit the honest zealousness on the part of the parent. And, your Honor, then we come to perhaps one of the most important things to be considered in this whole
3593 case, and that is that the weakness that Samuel Bayer displayed in this case was not a selfish one, it was not a weakness or a wrong, if it were a wrong done, for greed or for pride or for lust, or all those ordinary unfortunate frailties of human nature that bring about the great mass of crimes and suffering and misconduct in this world. His fault was the sweetest and loveliest fault that a human being could have. He may have done wrong, your Honor, and it may not be a thing that would be emblazoned in the poetry of one of the great poets, but it was a love that nature put in that man's heart. It was the love for his own son; and if it was energy and zeal misdirected it was misdirected partially by nature, and if it did a wrong, your Honor, it cannot be left unpunished.

But that is why, undoubtedly, this jury came back with
3594 the I think quite extraordinary procedure of using not the word clemency, but as the District Attorney has repeated, the highest degree of clemency.

Now I hope someone will extricate the learned District Attorney for his position of showing the magnanimity of taking the most severe sentence that could be imposed in law of twenty-four months, and taking off eight months from that and saying that is complying with this jury's request.

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We can't quite call it a mandate, but, after all, it is an important function, too; but I think, your Honor, that when one considers that Samuel Bayer himself has earned something by a life of probity, that ought not to be smashed, and that any imposition of a day in jail for this man would be like Humpty Dumpty—it never can be repaired. It is the grossest type of punishment, outside of taking the man's life, that could be imposed. I do not see any other purpose, your Honor, than to register my honest views in the premises, and if that were all that could be done, we would be faced with the dilemma, perhaps, of saying, "Well, we cannot let offenses of this kind to go entirely unnoticed." But, your Honor, I have one further suggestion: you will remember that this is not an indictment for bribery and, therefore, I say with great respect to this Court, I think that for a crime of bribery, if it is in this picture, he ought to have his day in court to defend on that charge, or if it is conspiracy to bribe he ought to have his day in court and be convicted of that if that is what he has done, before your Honor uses that in the imposition of sentence. He is not guilty in the eyes of the law of which he has been so found, and I, with great respect to this Court, for whom I have the highest respect and regard, say that most earnestly.

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Now, with that reservation, let me approach very briefly to the thought that this a novel type of prosecution, that is, Section 88 of Title 18, your Honor. Your Honor had to give his charge in full compliance with his duty as a Judge, that any type of fraud for any purpose or in any manner, when two people conspire to bring that about, is a violation of this statute. Now I think, your Honor, that some day Section 88 will come before the Supreme Court of the United States and they will reconcile it with the Cohen case in some way, because today really we are letting a jury determine part of the law, to determine whether certain conduct is or is not criminal. I have strong feelings on that,

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but this is no time to voice them. But I have a right to point out to your Honor that this jury could have brought in its verdict in this case on any one of the fifteen or twenty incidents that they found existed. They could have brought it in on merely talk with Colonel Vidal and nothing else, and they could have absolutely believed the statement of Samuel Bayer, Elias Bayer and Miss Solomon as to what happened with the payment of the substantial sum of money of $5,000, as your Honor would [redacted] no way of knowing that, except in special verdicts that we do not have in these criminal causes. And we all well know the presumption of the law that every fact is broad, every fact
3599 is concluded adversely to the defendant after the jury brings back a verdict of guilty. But in this peculiar case, your Honor, where the jury itself has to pick out something that it finds criminal, any one of these things, and the jury in such instances comes back to your Honor, with this juror No. 1 stopping last night at a late hour and saying, "The highest degree of elemency for all defendants," I think that was the statement to your Honor, that "We find there is, under your Honor's charge, technically a defense committed, but we think that it is not of sufficient importance to justify any severe sentence"—and if ever I knew a jury to be plentifully pleading with the judge to put the defendants on probation, that was the message that came from this jury box to your Honor, I say with great respect.

3600 And, of course, your Honor has no obligation in the law to follow that request of the jury; your Honor naturally has that function of the law to perform that the law wisely leaves, of course, to the learned judge, and leaves no part of it legally with the jury. But, your Honor, I cannot help reminding you, with great respect to you—and I know that while your Honor has graced this trial may I say fairly, I do not agree with your Honor's rulings, but I have never seen a judge who I felt was more intent upon

doing a square shooting job than your Honor has performed in this case—nevertheless, your Honor, there are considerations that I think, as human beings, we all have to observe, and that is, these boys are coming home; they have done something for their country. After all, if $1950 was paid by Samuel Bayer, it was paid by him and he no longer has it. That is gone, for whatever it amounts to. And that amounted to five days in the medical corps as a clerk. And, after all, the boy did go over to Burma, and many of us sitting around this trial table would have liked to have the same privilege, of doing what he did; we would stop, for one reason or another, from continuing further. And we don't know what he has been through. And perhaps, your Honor, you wouldn't mind listening to him, not on a matter of guilt, but if he were here perhaps your Honor would not mind listening to him, saying, "Well, Judge, I am a member of the armed forces and I have done something, and my dad had to weakness for me that I couldn't help, but I will try to expiate some of that in these rotten jungles, with reptiles, out here in Burma. Won't you charge that up against my father now? And won't you let him stay at my home and continue to support myself and my mother and his own widowed sister's family?" Because he has been shown anything, Samuel Bayer, your Honor, but a menace to anybody.

We have never seen a tendency, and we know his character will be pretty thoroughly looked over, but the weakness he has had has been, of course, that oh, so many parents could receive punishment for if the straight edge of the law were always applied without being bent here and there.

Your Honor, it is so an offense of love, and I hope that it won't be necessary for me to advert to the unfortunate suggestions that were made upon his character, with that unfortunate incident of that girl, working for a living, who came up and who was in the presence of the F.B.I. and

the lawyers from 10 o'clock in the morning until 4 o'clock in the afternoon, and they never broke down her story in one single regard, so that the learned and able District Attorney never asked her a question on cross-examination.

Now, your Honor, to take this man, under such circumstances, and remove him from the civil walks of life and take him and impose a prison sentence upon him, of course that is what it is, it is an institution, but we all know——

The Court: That distinction was only between jail and prison.

Mr. Keenan: Yes, your Honor. And I think that, if your Honor please, is more of a distinction of terms than it is
3605 of suffering; but whatever it is, it is present, and we all know what happens in such institutions. It can't be helped. And I would not say that I am seeking pity in this case, but I am pointing out facts which I believe are conducive to the administration of justice.

Now, as to Elias Bayer, I really feel that in the case of Elias Bayer I have been derelict in my duty, that he ought to have been represented by other counsel, that he had a matter where the evidence should have been carefully reviewed, and I think if he had there would have been no verdict rendered against him at all, because I am not going to try to advert to the evidence, but I am going to say that it is very trivial as to any actions of his. He never asked anyone to do any wrong that I know of. He listened to the conversations of Radovich, but he had no part in
3606 them, and he went down to see that money was—that Radovich was pointed out, and in a technical sense, your Honor, if he be found guilty that his contact with the offense was of the slightest, and I think there should not be very much effort pursued in asking that he be granted probation if any sentence is imposed, or that anything more than a fine, and a $10,000 fine, for a man like Elias Bayer, it seems to me would be very adequate punishment for any crime that was committed in this case with which he is shown to have the slightest connection.

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Now, your Honor, we have other matters in the case that will be presented at the time when a new trial is suggested, because unfortunately we did not have before your Honor yesterday the important information in substantiation of our claim with reference to the point made vital by the District Attorney in his argument to the jury. The jury came in to ask for information upon that precise point, and it is the only point in the whole lawsuit that they asked information about specifically.

Now we have evidence of the fact that this was a call put in by Major Radovich from the telephone company, and we did not have it before. I might state that I was 3608
caught entirely by surprise with the District Attorney's claim that no such conversation ever took place. We did not know what he would claim about it, but we did not think it would be that. We know, of course, that it is well known what Major Radovich's movements were in the month of November; they are easily ascertainable, and no one will ever convince me that they were not very well known.

Now, your Honor, I say as a——

The Court: Let me interpolate a question, lest I forget it later. You said something about a motion for a new trial being presented later. When do you propose to present such a motion?

Mr. Keenan: In accordance with the rules of the Court, your Honor, as soon as it can be filed.

The Court: Well, the only thought I had in mind, I 3609
expect to go home. Does it have to be presented to me? I suppose it does.

Mr. Keenan: I would not think so, your Honor.

The Court: You don't think so?

Mr. Keenan: I don't think so.

Mr. Robb: Might I ask at this time whether that should not be done before sentence? I don't know what the prac-

3610 tice in this jurisdiction is. I am just asking for information.

The Court: It has always been the practice, I do not recall the rule precisely now, but it has always been the practice before me to make the motion before sentence was imposed.

Mr. Robb: Yes, sir. That is our practice in Washington, too.

The Court: I don't know whether——

Mr. Keenan: Your Honor, this verdict did not come in until after 9 o'clock last night and the Court was convened at 10 o'clock this morning, so it was physically impossible,
3611 especially for those from out of town, to prepare a motion for a new trial in that interval.

Mr. Robb: We had intended, if the Court please, to make at least a formal motion for a new trial before your Hônor imposed sentence, in order to save our point. Of course we would prefer to have time in which to get one up and prepare it properly for your Hônor.

The Court: Well, it would seem to me to be proper prior to the time I do impose sentence that you may, any of you who wish to make motions for a new trial, make them and ask leave to amplify your grounds at a later time.

Mr. Robb: Yes.

Mr. Ansell: Is it true, may I ask your Honor—you will help out my ignorance——

The Court: There is not much assistance required for
3612 that, sir.

Mr. Ansell: Is it true, sir, that a motion for a new trial must, under our modern practice, be made in writing? Is that true?

The Court: That is not my impression.

Mr. Ansell: That is your impression?

The Court: That is not.

Mr. Ansell: That is not my impression.

The Court: I know many have been made to me not in writing, and it has never been——

Mr. Ansell: I was wondering, in order that we might get through with this thing—I don't know Mr. Keenan's feelings—as to whether we might not make a motion orally here with leave from your Honor to assign new grounds when we come to perfecting the record for the purpose of appeal. I don't want to disturb any practice that is here. Of course I couldn't but I do not want to.

Mr. Keenan: Your Honor, I am quite certain that the motion for a new trial on the grounds of newly discovered evidence certainly is not required to be filed before imposition of sentence.

The Court: That is right, but ordinarily motions for a new trial have always been, in our practice, prior to the imposition of sentence. A motion for new trial on the ground of after-discovered evidence is a different thing.

Mr. Keenan: I don't know if misconduct on the part of the jury would come within that category, I guess it would, but I intend to bring that formally before the Court, and I want adequate time to do it because that requires affidavits and other formal matters to present it in the form in which it deserves.

The Court: Understand, gentlemen, I am not undertaking to suggest to any of you how to conduct your case. I haven't found that any of you needed assistance along that line. But I did want to apprise you of the fact that I did not expect to be here probably after today.

Mr. Keenan: Well, I think, your Honor, that I have said substantially all that I want to, excepting I would remind your Honor of this one thing that I think is entirely proper to bring up before any sentence is imposed, that there ought to be a reference to the probation officer in a case of this nature. It doesn't deal with dangerous criminals, it doesn't deal with the type of crime—or greed; it is an extraordinary affair. And I would think that the Court

would want all the law and information it could have, and it might permit us, your Honor, to bring upon the record the more definite proof of the condition of Martin Bayer, who suffered double pneumonia and was a very sick man, and whom I can say to your Honor has been ill with jungle fever over in Burma for some time past. And I would like to have that information before you, your Honor, in acceptable form before you did pass upon the subject matter of probation.

The Court: I do not think a probation report is necessary, and I am not going to defer the matter pending probation.

3617 Mr. Keenan: I, of course, can do nothing more than ask your Honor to follow the practice of the courts in that regard.

Then I will say, since your Honor stated that he is leaving, that I would like the record to show that a motion for a new trial has been filed or is being filed on behalf of Samuel and Elias Bayer and will be amplified later, when we have an opportunity to bring the matters on the record that deserve to be brought to the Court's attention.

The Court: Do you wish to be heard on the matter?

Mr. Robb: Yes. I wonder if I may say one word to your Honor on the subject that was opened up by Mr. Keenan. Mr. Keenan spoke of the conduct of some of the jurors. About that I know nothing whatsoever. Mr. Keenan spoke specifically of one lady juror, juror No. 2, I believe, and
3618 stated that that lady was here for the kill. I wish to be perfectly fair with the Court and perfectly fair to that lady juror and I, therefore, tell your Honor these circumstances.

Last night when I left the court house I was waiting under the archway for the rain to lift or the car to come. I met that lady juror, No. 2. She was weeping. She came to me and she told me that she was weeping because of the conviction of my client, Major Radovich. She said she

did not think that she would be able to sleep that night because that boy had been convicted. She said that she hopes that your Honor would heed the jurors' recommendation that your Honor extend the highest degree of clemency to the defendants, and particularly to Major Radovich. She said, in substance, that she hoped that your Honor would not ruin Major Radovich, that the uniform would not be stripped from him, because she thought that he was a boy who had great possibilities, and it grieved her to see his life thus early ruined. And she told me that she thought she would come down here today because her interest in the matter was so great that she wanted to come down and be sure that your Honor did in his compassion 3620
heed the jury's recommendation. And that, if the Court please, is what she told me, as to why she came to be here.

May I say one thing further, if your Honor please. I cannot say with my colleagues that I have had no experience in criminal cases because for seven years I was a prosecutor in an office where we had about 2,000 indictments a year, and there were perhaps five or six of us trying or handling those cases, and I was one of those five or six. I have seen a great many men sentenced; I have sent a great many men to the penitentiary myself and some to the electric chair. My judgment is, if the Court please, that a court sentence ought to respect the judgment of society and the judgment of the community in the matter, and I think that your Honor will agree from the attitude of that jury, from the fact that they were crying when they brought in 3621
the verdict, that their judgment and the judgment of this community is not that this boy, Major Radovich, or any other defendant ought to be dealt with harshly or severely in this case.

Mr. Ansell: I feel that I ought to say, your Honor, that as I was leaving this building last night I ran into what appeared to be a great number of the jurors. They told me they were the jurors. They were much affected. Some of

them placed their arms around me, on my shoulders, and I heard some of them say, "We are going down to the court tomorrow, hoping that the Judge may deal leniently"—some said—"with Major Radovich." Some said "with all."

I saw that they had been terribly moved during their nine hours out there in the jury room. I heard myself no suggestions of misconduct, but I am not, of course, in a position to deny anything that was said. I only know what has happened out there. A strange episode in my life. I got out just as soon as I could because I did not want to talk.

Mr. Robb: If your Honor please, may we file at the
3623 time verbally a formal motion for a new trial?

The Court: Yes. On the subject of the jury, I know nothing about the conduct of the jurors except what took place in the court room; but I will take occasion to say that any criticism of any juror who has been discharged for coming back to the court room to hear the termination of the case is, in my opinion, ill founded. A juror who is not serving any business somewhere else is perfectly free to come into this court room just as well as anyone else.

Mr. Keenan: Since I made that statement, I would like to make it clear that that is my view, and if that were not hooked up with conduct that I will present affidavits concerning that particular juror and what I have said took place——

The Court: You have the option of bringing it——

3624 Mr. Keenan: I want that to go on the record, that that happened. I am not saying that any juror does not have the right to go any place he likes. But I am saying I have reason to believe and will substantiate it with statements under oath that that juror exercised an interest in the case on points that should not be considered by any juror, and I want to bring that to the attention of the Court.

The Court: Very well. You can bring any documents you please any time and the Court will consider them. Do you wish to be further heard?

Mr. McGohey: I have nothing further to say, your Honor.

The Court: I am going to take a five-minute recess.

(Short recess.)

The Court: Gentlemen of counsel, I have listened very attentively to your able presentations of your causes this morning, and it now becomes my duty to pronounce judgment, and I have not a great deal to say in so doing.

I will advert, however, briefly to the suggestion of racial prejudice having a part in the trial of this case. I find no evidence whatever that racial prejudice had anything to do with the prosecution or presentation of this case whatsoever. I do think that the witness, Captain Jack Pepper, made some statements from which some prejudice on his part might be inferred. However, the fact is that Captain Pepper did not instigate this prosecution or investigation, but, on the other hand, that he had plead guilty to what in effect was impeding the investigation, and it further appeared to me that he testified quite reluctantly. So, whatever prejudice he may have had, or felt, was not a matter which instigated or had any part in the investigation or prosecution of this case. And I have noticed no evidence or indication whatever that the matter of racial prejudice had had anything to do with the investigation or prosecution of this trial.

Now the matter of consideration in the imposition of sentence, as General Ansell has suggested, is a distasteful one. It is, I find, the most trying and disagreeable duty which I am called upon to perform, but it is my duty and it is my duty to consider the matter of sentence and arrive at my independent conclusion according to my best judgment.

I have considered the recommendations of the United States Attorney and I have considered the recommendation of the jury last night for clemency. Just exactly what the jury meant I don't know. The jury did not know, and had

no means of knowing, what the penalties provided by the law were. However, irrespective of what they may have meant, it is my duty to pass on the question according to my best judgment, and certainly the jury was not misled because when they asked the Court the question whether they might recommend clemency, I replied to them that they might, but that it would not be binding upon the Court. I made no representation that I would consider such a recommendation if they made it. And I have considered it, however, though in some respects I am not going to be guided by it.

Now, first, in regard to the Bayers, I am satisfied that
3629 both Bayers are guilty as charged and that it has been abundantly proven, and that they have been convicted after a fair trial. It is true that they have good reputations in the community and no previous offense as far as I know; and it is also true that the commission of this offense is attributable primarily, I suppose one should say, to filial affection, the affection of a father for his son, and the affection of the two uncles for their nephew, and that is a praiseworthy trait. However, that affection, that feeling of affection during the past few years is not one which was peculiar to the defendants Bayer; I suppose every father in the Nation, there are millions of them, who had their sons called into the service of their country, felt the same affection. As a matter of fact, I think it might be safely said that every father whose son was called into
3630 service would have been glad to bare his breast to the enemy rather than expose his son to the same danger.

But these defendants proceeded to the commission of very reprehensible acts. I am satisfied that, besides this particular officer, Major Radovich, they undertook to corrupt other officers to secure discriminatory treatment for these two young men, and as to the young men I wish to interpolate that there is no suggestion anywhere of any misconduct on their part or that they did anything but what

seemed to be their duty. But I cannot say the same for Samuel and Elias Bayer. They didn't stop to think that in securing by improper means the transfer of their loved ones from an organization which was apparently destined for overseas combat duty, that someone else, some other fathers' sons would have to take their place. If all the fathers in the United States had been guilty of conduct such as theirs we would never have had the Army which we had. And I consider their conduct even more culpable in that when the Government's net began to tighten around them, they then undertook to place all the blame, or certainly the greater portion of it, upon the shoulders of the defendant Radovich, a young man who in my opinion was certainly no more culpable, if as much, as they were.

Samuel Bayer, stand up.

(Defendant Samuel Bayer arose.)

The judgment of the Court is that you be sentenced to serve a term of two years in such institution as the Attorney General may direct, and pay a fine of $10,000.

Elias Bayer.

(Defendant Elias Bayer arose.)

I think you are guilty, but not in as much degree as your brother, and I sentence you to serve the term of eighteen months in such institution as the Attorney General may direct, and pay a fine of $5,000.

The defendant Radovich has many appealing features to his case. He is a young man who was exposed to temptation. He has a family, for whom I feel the greatest sorrow. And after the commission of this offense he voluntarily embarked upon an extremely dangerous mission, behaved himself gallantly, with outstanding gallantry, and achieved a record which any soldier might be proud of. However, I am satisfied beyond any doubt whatsoever that he betrayed the honor of the United States Army for a monetary consideration. I can't conceive of anyone being

convicted of that offense and not receiving a term of imprisonment.

I am going to impose punishment. The judgment of the Court is that you serve a term of a year and a day in such institution as the Attorney General may direct, with no fine.

Is there anything further, gentlemen?

Mr. Robb: If your Honor please, as to the custody of the defendant Radovich, would your Honor permit him to stay in the custody of the Army, as he has been up until now, pending appeal?

The Court: I will hear from the United States Attorney.

3635 Mr. McGohey: If your Honor please, the Government will oppose that motion, will oppose a motion of that kind on behalf of any of the defendants here. I think——

The Court: Is there any motion to that effect?

Mr. Keenan: Certainly. We ask for a stay of execution, that execution be stayed, and that the bail be continued on the ground that there are substantial matters of fact and law already in the record before the end of this case justifying that action, and, furthermore, there are substantial questions that will arise and are arising, of the misconduct on the part of the jury and various aspects of this investigation.

Mr. McGohey: The Government is of the opinion that there is no substantial question of law involved in this case on behalf of any of the defendants, and, therefore,

3636 under the rules, the Government believes that none of the defendants should be admitted to bail, but that they should be committed. And the Government opposes the application for bail or the discharge and custody of any of the defendants.

Mr. Robb: If your Honor please, we intend promptly to file our notice of appeal and we are sincerely convinced we have substantial questions of law upon which to base

that appeal. We think that, under those circumstances, the Court ought to let Major Radovich stay in the custody of the military authorities as he has been. There could be no question whatever that Major Radovich will be here at any time this Court desires.

Mr. Keenan: And there is no more question about the appearance of either of the two Bayers. They live in this community and have lived here all of their lives, and there is no danger of either of them escaping the jurisdiction. Their case is identical with Major Radovich in that regard. And we ask that the execution be stayed pending our filing a motion for appeal.

Mr. McGohey: As your Honor knows, the determinative 3638
question in this matter of bail is not the likelihood of their running away, but the question of whether or not there is a substantial question——

The Court: I am familiar with the Supreme Court rule which is applicable to this Court, and it is quite different from the rule prevalent in many state courts. The rule, I do not recall it precisely, but in general effect it contemplates that prior to conviction bail should be freely granted because up until then the presumption of innocence stands. After conviction the presumption of innocence disappears, and the presumption is the other way.

As I recall the rule, in effect it provides that after conviction bail should be denied unless the Court thinks there is reasonable doubt of the correctness of the conviction
or that there is a substantial question or questions which 3639
should be reviewed. I am not of the opinion that either one of those conditions exists.

Therefore, motion for bail as to all defendants, or that Major Radovich be returned to the custody of the Army, will be denied.

Mr. Keenan: Your Honor would not stay that until we can prepare papers in the Court of Appeals within the next few days?

The Court: Yes, I will do that.

Mr. Keenan: Would your Honor give us a week within which to do that?

The Court: I think that is reasonable.

Mr. McGohey: I don't believe it is reasonable, your Honor. I don't think there is any—as your Honor stated—substantial question raised here at all. I strongly oppose the stay of surrender for a week.

The Court: My consideration of that is not on the basis as contemplated by the rule. That is to say, in granting that request I am not doing it on the basis that there is a substantial question or that I consider that there is
3641 reasonable doubt. It is purely on a humanitarian basis. I do not think there is likelihood that any defendant will fail to appear on the date upon which they are directed to surrender unless it should be otherwise overruled by higher authority. I think it would be unduly harsh to all these defendants to immediately, at this very minute, commit them to jail. I am going to allow them until Wednesday morning, one week from today, to surrender.

Mr. Ansell: Your Honor, there are consequences under the statute that I think distinguishes Major Radovich's case. Major Radovich, of course, has nothing of this world's goods. He has a wife and child. When he goes to prison, when he has remained there a little length of time, I am sorry I can't recall now, he will be discharged
3642 from the Army, as I remember the statute; there will be that sequence. He has actually nothing. A wife and child. Then if there should be a reversal, and, of course, I understand your Honor's position, with which I most respectfully differ—we have all been mistaken about that, even trial judges; I believe myself there is a matter here, and if I didn't believe it with the utmost sincerity, I should not state it, that will go to the Supreme Court of the United States; I refer your Honor to the matter of confession. No matter what may happen after Radovich goes to this

institution, a penalty of the most drastic kind is visited upon him beyond all correction hereafter. I wish your Honor would please, please let——

The Court: I have thought about that, sir, and I have the utmost confidence in the sincerity with which you express it, but I don't think that those considerations justify granting on my part bail. Application will be denied.

Wednesday morning, at 10:30, to surrender.

Mr. McGohey: And the direction is that the defendants surrender at that time unless bail is granted?

The Court: Yes. Unless bail be granted by the Circuit Court the defendants are directed to report to the marshal at 10:30 Wednesday morning. 3644

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**Government's Exhibit 1.**

OATH OF OFFICE

OFFICERS' RESERVE CORPS

I, WALTER VESELIN RADOVICH, having been appointed a 2nd Lieut. Air Corps in the Officers' Reserve Corps of the Army of the United States, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter: SO HELP ME GOD. 3645

WALTER V. RADOVICH
2nd Lieut., Air-Res.

* * * * * *

Sworn to and subscribed before me, at Brooks Field, Texas this 29th day of May, 1941.

ROY W. OSBORN
1st Lieut., Air Corps
Summary Court

3646

**Government's Exhibit 2.**

Special Order Number 231
Restricted
Extract

HEADQUARTERS I FIGHTER COMMAND
MITCHEL FIELD, NEW YORK
19 August, 1943

* * * * * *

2. The following transfer is directed:

Name, Grade, Serial No.

MELVIN USDAN,
3647 Pvt (501)
12219208

Reld. Fr.

Hq & Hq Sqdn,
I Fighter Command,
Mitchel Field, N. Y.

Transfd. To

Det., Medical Dept.,
Army Air Base,
Mitchel Field, N. Y.

(AUTH: 12th Ind, 201-Usdan, Melvin (Enl), Hq, AF, EDC
3648 & First AF, 17 AUGUST 1943, on ltr, Melvin Usdan, 20 JULY 1943, Subject "Request for Transfer.")

* * * * * * *

4. The following transfer is directed:

Name, Grade, Serial No.

MARTIN BAYER,
Pfc (501)
12219010

*Government's Exhibit 2.* 3649

Reld. Fr.

Hq & Hq Sqdn,
I Fighter Command,
Mitchel Field, N. Y.

Transfd. To

Det., Med. Dept.,
Army Air Base,
Mitchel Field, N. Y.

(AUTH: 12th Ind, 201-Bayer, Martin (Enl), Hq, AF, EDC & First AF, 17 AUGUST 1943, on ltr, Martin Bayer, 20 JULY 1943, Subject "Request for transfer.") 3650

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**Government's Exhibit 3.**

Restricted

HEADQUARTERS ARMY AIR BASE
WESTOVER FIELD, MASS.

Special Orders Number 325 22 Nov 1943

* * * * * * *

32. *T/5th Gr (055) MELVIN USDAN, 12219208, Med Det, 881st AB Engr Avn Bn 3651

Pfc (055) MARTIN B. BAYER, 12219010, Med Det, 882nd AB Engr Avn Bn

are trfd in their present gr to Project #CA-281, and WP at the proper time, by rail fr Westover Fld, Mass, to Goldsboro, NC, reporting not later than 25 Nov 1943 to the CO, Overseas Repl Depot #3 thereat for further overseas asgmt, semi-tropical climate, on per ch of sta. TDN.

1-5250 P 431-02, 03, 08 A 0425-24. Asterisk (*) denotes NCO in charge. It being impracticable for the Govt to furn cooking facilities for rat, meals for two (2) men for six (6) meals a/r $1.00 per meal will be furn on meal tickets under the prov of AR 30-2215. Dependents are not atzd to accompany or join EM. The QMC will furn the necessary T. Auth: AR 615-200, 15 Mar 1943, and TWX AFPMP 3888 fr the CG, AAF, Washington DC, 22 Nov 1943.

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**Government's Exhibit 4.**

3653

HEADQUARTERS TECHNICAL SCHOOL
ARMY AIR FORCES TECHNICAL TRAINING COMMAND
Seymour Johnson Field, N. C., 29 Nov 1943

* * * * * *

38. The following EM are reld fr atchd 715th Tng Gp, this sta, are trfd and WP Second Ferrying Group, Second Ferrying Division, Air Transport Command, New Castle Army Air Base, Wilmington, Del rptg to the CO thereat for asgmt and duty. EM reld fr asgd Project CA-281.
T 5 (055) Melvin (NMI) Usdan 12219208
Pfc (055) Martin B Bayer 12219010

In accordance with AR 30-2215 the QMC will issue two (2) meal tickets to two (2) EM for one third (⅓) days ea.
TC will furn nec T. TDN 1-5250 P 431-02 A 0425-24.
3654 Auth: Ltr WD HQ AAF Wash DC 25 Nov 1943 File AFPMP-2-KRS/mm/nlr Subj: Transfer of Enlisted Men.

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**Government's Exhibit 5.**

Ledger (page 4)—I. Buss Uniform Co.

(Bound in Opposite.)

Sheet No. _____ Account No. _____

Terms _____ NAME Mitchell Field, New York

Rating _____ ADDRESS W. L. Craing

Credit Limit _____

| DATE | ITEMS | FOLIO | DEBITS | DATE | ITEMS | FOLIO | CREDITS |
|---|---|---|---|---|---|---|---|
| 1943 May 10 | Capt Rasonelli | 5513 | 8080 | | | C 74 | 38790 |
| 10 | Col Jacobson | 5514 | 8080 | | | C 199 | 9595 |
| 10 | Martin Bayer | 5515 | 687 | | | | 48385 |
| 10 | Col. Tidall | 5516 | 8080 | | | | |
| 10 | Lt Rosser | 5517 | 7777 | | | | |
| 10 | Capt Englehart | 5518 | 9595 | | | | |
| 10 | Capt Rasonelli | 5519 | 1995 | | | | |
| 10 | Martin Bayer | 5520 | 3333 | | | | |
| W | Col Jacobson 1595 | 5604 | 758 | | | | |
| | | | 48385 | | | | |

EXHIBIT 5
U. S. Dist Court
S. D. of N. Y.
OCT 4 1946

728197 O—47 (Face p. 1218)

**Government's Exhibit 6.**

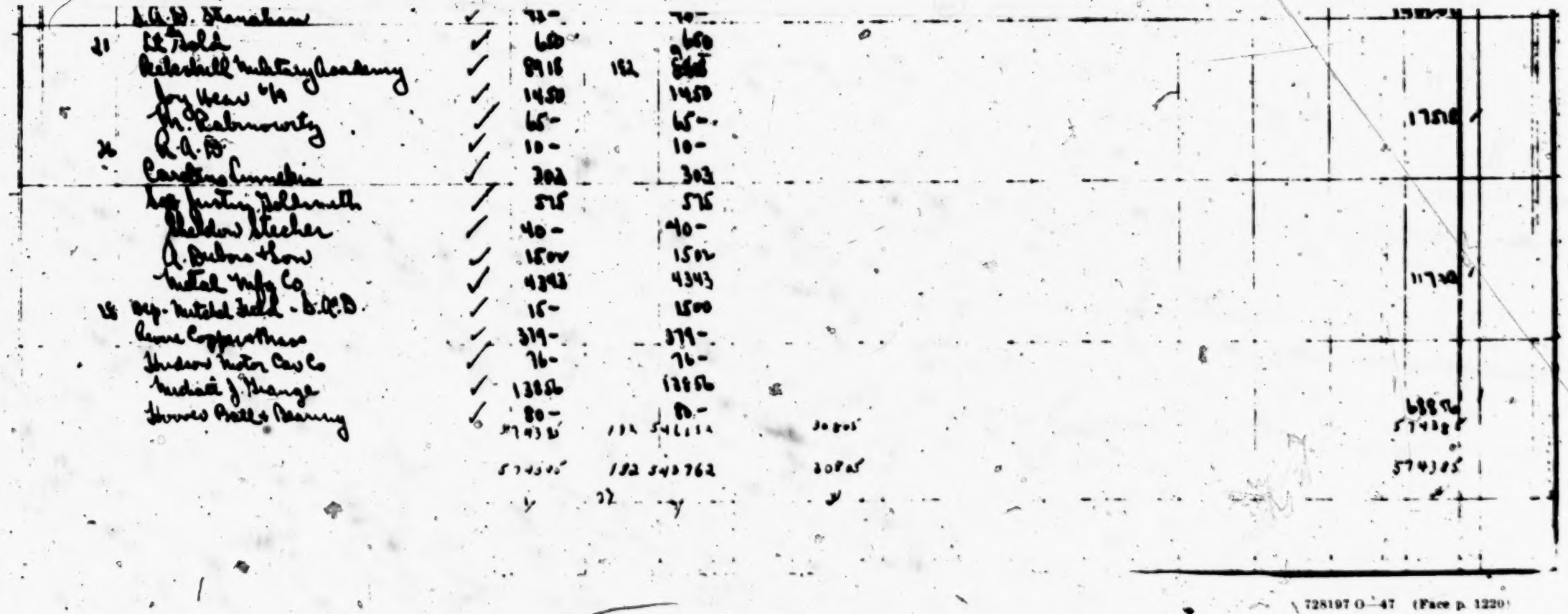
Page 74 of cash book—I. Buss Uniform Co.

(Bound in Opposite.)

EXHIBIT 6
U. S. Dist. Court
S. D. of N. Y.
OCT. 4 1945

June 1942

| June | | Cash | Bonds | Stocks | Loans | Interest |
|---|---|---|---|---|---|---|
| 1 | Lumber Mfg Co. | 284- | | 284- | | |
| | Northwest Paper Mill Co. Port Angeles, Wash. | 15450 | | 15450 | | |
| 2 | Lumber Co. | 1060 | | 1060 | | |
| | " | 2174 | | 2174 | | |
| | " | 65610 | | 65610 | | |
| | A. Philippsborn | 4750 | | 4750 | | |
| 7 | Hudson Motor Car Co. | 332.50 | | 332.50 | | |
| | Metal Mfg Co. | 7978 | | 7978 | | |
| 10 | Exchange | 30905 | | | 30905 | |
| 14 | Plymouth Thread | 16182 | | 16182 | | |
| | " | 28556 | | 28556 | | |
| 15 | Am. McKay Shoe | 158 | | 158 | | |
| | Textile Trends | 41460 | | 41460 | | |
| | " | 39870 | | 39870 | | |
| | Lumber Mfg Co. | 150- | | 150- | | |
| 16 | Corporation Report | 1364 | | 1364 | | |
| | Goldberg | 3626 | | 3626 | | |
| 18 | Courtaulds Limited | 960 | | 960 | | |
| | Cutting Uniform Co. | 60- | | 60- | | |
| | A. Philippsborn | 11350 | | 11350 | | |
| | Automatic Textile Mfg | 1212 | | 1212 | | |
| | Arma Corp | 26179 | | 26179 | | |
| | J. L. Jacobs Co | 900- | | 900- | | |
| | A. A. Sheahan | 45- | | 45- | | |



728197 O—47 (Face p. 1220)

**Government's Exhibit 7.**

Entries of items 5512, 5580 and 5604 in record book.

(Bound in Opposite.)

April 7, 1943
5510

Peekskill Military Academy
Peekskill, New York

27.10 days Com

3 Service Uniforms for Samuel Stabner @35.00 105 —
Joseph Storm Jr
James Edward Rogers

3 Dress Uniforms for Samuel Stabner @31.00 108 —
Joseph Storm Jr
James Edward Rogers

213 T

Times Express Prepaid
E

April 9, 1943
5511

Memo

Joy Dress Uniforms
90 Fifth Ave
City

1 Sample Ladies Uniform @28.50 28.50

E

28.50

5512

Plymouth Thread & Yarn Co
30 Hr 21 2 Ply
Rope
1 Jute Lot Thread

341.94

7 744

72197 O—47 (Face p. 1222) No. 1

May 5 1943

Capt Ledwig
Mitchell Field
Mineola L.I. NY

Corporation Stamping Stamp
1 Pr Capt Bars @ 3 25 3 25
2 Sets Captain @ 1 50 1 50
2 Sets U.S. @ 1 75 3 50
2 Sets Pilot Wings @ 75 1 50
1 Pr Cuff Links @ 1 25 1 25
1 Pr Service Wings on Cont @ 3 00 2 00
@ 4 50 4 50
19 75
Less 20
$ 19 55

May 5 1943
3581

Plymouth Thread & Yarn Co
30 W 21 St
NYC

1 Pce of Cloth @ 33.00 33.00

for Lieut Solomon

Less 33.00
33
$ 33.33

May. 5 [illegible]

30639

Net 30 days

Tudor City Sweets Shop Inc
[illegible] Co the Legend
551 39th Cave Mfg

12 Summer Uniforms
5 Doormans Caps
6 Pea Jackets

@ 27½ ea 324 .
@ 25 ea 13 75
@ 95 ea 57 00
394 75
Mfg Tax 395

398 70
13 75

Hotel Tudor
305 & 41st St
Mfg

72810?—47 (Rev. 12-22) No. 2

May 22 1943
5603

L4V39. 8

Net 10 days

F. L. Jacobs Company
Lonyo Plant
4600 Lonyo Rd Detroit Mich

45 Cadetberg Inspection Harness Caps @ 3.00 135.

5% 6.75

128.25

135.

May 5604 43

Plymouth Thread & Yarn Co
30 thd 21st 30
Nyc

Net

1 Pr Enlisted Mens Dress Gloves @ 7.50 7.50
Nyc Sant 08

7.58

for Robert Bayer.

RECEIVED from J Bruns Uniform Co 84-5 Clinton mail.
described pieces of One C.O.D. (letters)

NOTE. Additional receipts of this kind will be furnished on request at mailing only, upon payment of 1 cent for each article listed on each additional copy of the bill. Claims for indemnity can not be paid unless articles are properly marked and endorsed, and claims are filed within the prescribed time limits. (See postmaster for detailed information.)

| NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS | Postage (exclusive of other charges on box) | Insurance or C.O.D. fee | Fee for postal or return receipt | Special delivery fee | Special delivery fee (Sunday or holiday) | Limited delivery (Sunday or holiday) | Restricted delivery | Delivery restricted. Fee paid |
|---|---|---|---|---|---|---|---|---|
| Carrier W J Dunphy Man PO Hoboken NJ | | | | | | C.O.D. 92¢ | | Remarks |

NO. 538131

DUE SENDER $ _____

(At the stamps head for fee, if known, at time of mailing)

P.O. FEE _____

TOTAL _____

MAY 8 1943 POST

(Postmark and date of receipt)

Use apply only to fourth-class parcels. Special-delivery service also includes special-handling [illegible] "P" if Perishable, "E" if Eggs, "EH" if Eggs for Hatching, "B" if Butter, Cheese, and "FLC" if Fruits Cheese. This Fee (___) Postal mark must be over seal

Number of pieces listed by sender One C.O.D. (Write number here in words)

Number of pieces received at post office

Postmaster, per _____ (Name of receiving employee)

22

728197 O—47 (Face P. 1222) No. 8

3670

**Government's Exhibit 8.**

STATEMENT

OF

SAMUEL BAYER
657 Doughty Blvd.
Lawrence, L.I.

Before:

EDWARD C. WALLACE,
Assistant U. S. Attorney

Present:

3671 JOSEPH B. KEENAN and
WASHINGTON I. LEVY
Attorneys for Mr. Bayer.

Taken: February 7, 1945
Steno: F. Meisner

Q. Mr. Bayer I understand that you want to make a voluntary statement in connection with the matter on which you were arrested on the complaint some months ago.

A. Yes.

Q. And you have consulted your attorneys in that matter and they have advised you to make such a statement?

A. Yes.

Q. You understand that any statement you do make
3672 might or could be used against you later in any criminal proceeding, don't you?

A. Yes, sir.

Q. Suppose you go right ahead and tell us everything you know in connection with Radovich.

A. My boy was stationed in Mitchell Field.

Q. That's Martin Bayer?

A. Martin Bayer, he was there for about 3 or 4 months when I met some officers, their names were Colonel Jacob-

sam, Colonel Vidal and Lt. Roser. I met them through my younger brother.

Q. That's Elias Bayer?

A. Elias Bayer. They used to come up to visit him and naturally I was introduced to them and we used to take a drink on and off, they were very nice. In the time that they used to come up Col. Jacobson saw the pictures of my boys and we were always talking about my kids, I was asking how my kids are. They asked me what my kids were doing and I said they were clerks. He said "I need some clerks in my department and I am going to ask for them." Mr. Wallace I didn't know the difference from this department and that department, but I felt he was a friend, 3674
he used to come up, and I said all right. When the boys were transferred Capt. Radovich came up to the place, he came up the first time he was introduced to me, he came I am positive with Lt. Roser. He said "I'd like to get a uniform," so the other officers already I met them asked to get uniforms at wholesale prices, and I happen to have a brother-in-law who is in the uniform business, I said to them "Go up there and you will be treated right". He went up there and I think he ordered two uniforms, a winter one and a summer one. Since then Mr. Wallace he became a regular, coming in almost every day, sometimes twice a day, he used to come to my office and sit at my desk, where you sit, put his feet on there. He used to come in many times lunch hour and I would take him to lunch, many
times he would come in with a staff car and bring his chauf- 3675
feur up and the chauffeur would be sitting in the office. You can believe me when I tell you I was so disgusted, I was ashamed when customers or salesmen came in, it was a regular hangout. Sometimes he would come in with Col. Jacobson and we would take a drink and then they would go away. This was going on for quite a while until one day he calls me on the telephone and he says "Sam something happened." I said "What happened?" He said "I

3676 *Government's Exhibit 8.*

can't tell you, I am coming over to see you" and he came over. I said "What happened Walter?" "I got to send the kids out." I said "Where to?". He said "To Maine, for overseas."

Q. State of Maine?

A. Yes, I believe he said Westover Field or Bradley Field, and he tells me this company is being broken up and he has to send them out. I asked him whether my boys couldn't remain on the field there, he said no he had to send them out. I felt pretty bad about it, but I couldn't do anything, so he left. The next day he came into the place "Sam I got an angle.". I said "What's the angle?" "I can
3677 have the boys transferred to the Medical Corps." I was very happy and I thanked him. We were just talking, my bookkeeper was in the office and my younger brother was in the office and he turns to me and says "I want to speak to you" so I looked at the girl and my brother they should go out. They stepped out. He said "Sam I need $500, I have to send my wife home to Los Angeles." I didn't like it Mr. Wallace, I didn't know what to think whether it's a loan or a holdup, so I said to him "I haven't got no money on me now, come in tomorrow and I'll give it to you." I could have given him the money the same day if I wanted to but I didn't want to. He showed up the next day and I gave him $400. I told him that's all I could get together. I could have given him the $500, I just wanted to show him
3678 it wasn't so easy to get money. When he was walking out my bookkeeper and my brother walks in and she said "I heard all about it." I said "Ann I don't know whether it's a holdup or a loan, I don't know. My brother shrugged his shoulders. I said "I told him I'll give it to him." She said "Yes, I heard it." A short while after, maybe a week later, he comes in to me "Everything is fine, the transfer is going through" telling us about different flights that he made, etc. and he turns to me again and says "I want to speak to you Sam." I knew then he was going to hold me

up and I turned to my brother and my bookkeeper and they walked out. By that time they were wise to him too. He said "Sam I need $500 more." I said "What do you need it for Walter?" "I need it," with a kind of smile on his face. I said "I haven't got it Walter, you know it's a lot of money." "Well Sam I need it, get it for me." I didn't know what to do, I didn't know what to say to him, but I was scared if I didn't give it to him he will take it out on my kids, so I promised him I'll give it to him. I told him I'll try to get it together and he left. A few days later he walks in "Sam I got bad news for you, the application fell through and the kids will have to go overseas." He took my breath away and I didn't know what to say, 3680
and then he turns to me "Sam I want to talk to you." They knew already, they walked out. He said "I need another $1000 that I have to give up to somebody on the field and if I do that the applications will go through." Mr. Wallace I was just stunned, I knew definitely that I was being held up and then it come again to my mind if I don't give it to him he will take it out on my kids. I told him I would give it to him. He asked me how quick I could get it, I told him I would try my best. By that time I owed him $1500, I didn't give him the other $500 yet. I said "Call me up" and he called me a few days later and he asked me if I have it and I said I have some. He said "Meet me at the Radio City Theatre." It was late in the afternoon, it must have been 5 or a little after. I got there a little
ahead of him. He walked over to me and then he walked 3681
me over to his car which was parked on the corner. He got into the car and I got in with him and I gave him $500. He asked me why I didn't get more together and I told him I just couldn't. I said "I'll try to get it together in a few days I'll give you some more." He called me and told me to meet him at the St. Moritz Hotel and I met him there. He took me up to his room and I gave him $400. The next he came up to the place and I gave him $600.

3682 *Government's Exhibit 8.*

After that Mr. Wallace, I am a little ahead of myself—when he came the third time for the $1000 and when I told him I would give it to him he lifted up the receiver, he was sitting at my desk there, after I told him I would give it to him he lifted up the receiver and called Mitchell Field and he asked for a certain Lt. and he tells the Lt, "Please" he said "do me a favor and fill out two applications for the kids" my son and my nephew, "and have them sent up" and he said "If you will do that for me" he said "I am going to get you a leather flying jacket" and he sat there for a few more minutes and he left. The boys were then transferred a short while after. They were
3683 there just for about a week, it was a very short time at the Medical, they got notice to leave, one for Bradley Field and one for Westover Field. My kid when he got there called me on the phone, as a matter of fact he called me very day because I asked him to specially, and he told me what a nice place it is and what a nice Sgt. from Brooklyn and he was very happy and I was very happy and contented as long as the kid was happy up there. I went along two or three weeks, the kid called me lunch hour or home at night and he talked to his mother too and he kept on telling us how happy he was, and he said he was going home for a weekend with some of his friends. I don't know whether it's two or three weeks that passed and I don't know whether it was a Sunday or holiday, but I was
3684 home, that morning Capt. Radovich called me and said "Sam I found out who done the transferring and" he said "if you will give me $1500 more, I'll have him transferred back to Mitchell Field." I said "Walter please let's forget all about the kids, they are very happy, they met a nice captain, a nice sergeant." He said "All right you are foolish." He said he was at New York at some hotel and I hung up or he hung up on me and said goodbye. Maybe about a month later he calls me once in the place and he says the same thing. "Sam you are foolish, now I'll be

leaving pretty soon, if you will give me the $1500 I'll have the boys transferred to Mitchell Field." I said "Walter I told you once before please let's forget all about the kids, they are happy and I am happy." The conversation was over. I haven't heard from him then for about a month, and one day I walk into the place and my secretary tells me, you will excuse me, she said "the rat called". I said "what for?" She said "He wants to see you and me at the McAlpin." I said "Why did you make an appointment?" and she said "I made it" and we came to the McAlpin Hotel. We were in the lobby and I went to buy some cigars at the cigar stand and by the time I came back I saw Miss Solomon talking to him on the line where they register. I had no love for him, so I didn't go near him, I stood maybe 10 feet away and he was showing her a letter, reading, and afterwards I saw another Lt. came over, or an officer I think it was a Lt., so I walked over and hello, etc. he introduced me and we went downstairs in the McAlpin and we ate. When we got through eating, it didn't take very long, and we left and he remained with this officer. At the table he was telling us of flights he made, etc. which was of very little interest to me. Then I haven't heard from him for maybe six weeks or two months, and one morning he calls up and gets hold of my secretary. I don't know whether I was busy on another line talking to some customer or what, and he tells her he has to meet me and her, very important, he is flying in from Washington. She made the date to meet him at 12 o'clock for lunch in Cavanaugh's Restaurant on 23rd Street. Whether it was an hour later or half an hour later but my kid then called me from Westover Field and he tells me "I and Melly are leaving for Goldsboro."

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3687

Q. You mean Melvin Usdan?

A. Yes. I said to myself "there is some trouble" and I just couldn't wait until the 12 o'clock came along. We met him in the restaurant and we had a couple of drinks and

3688 *Government's Exhibit 8.*

sat down to eat, and he started to tell us that he was leaving for Burma, India, on a very dangerous mission and that they were lucky if they would be back in about 8 months and that mission would write history. Then he says to me "I signed out a request for the two boys, I am taking them with me." I said "Walter what did you do? Why don't you take your hands off my kids, why did you do it, please leave them alone, I asked you that before." He looked up at me with a smile and said "Don't worry Sam, if we are lucky we will be back in 8 months." I said, "Walter please leave them alone, I never done you any harm, why do you want to take it out on me and the poor
3689 kids." He said "Sam, I'll tell you what I can do for you, if you will give me $5000 I'll have them transferred elsewhere." I said "$5000, I don't know where I can get it." He said "Sam don't think it's for me, I have to give up $2000 to somebody and $1500 to another fellow and all I'll get will be $1500." I pleaded with him Mr. Wallace and he was just like a stone. We got through eating, I didn't even pay the check, my girl paid the check, we walked outside and he called a cab. I said "Where are you going?" He said "To LaGuardia Airport." Miss Solomon and I followed him into the taxi and I pleaded with him and he kept on telling me the same thing, he wasn't getting the money and that was the best he could do. When we got to the airport he jumped out and he said "Well
3690 Sam the time is short, think it over and I'll see you tomorrow morning." The next morning he came to the place "What did you decide?" I said "Walter I haven't got the money, I haven't got it." He said "Don't tell me that, you are plenty rich." I said "Walter I haven't got the money, please leave the kids alone." He said "Sam I told you once before if it was up to me I wouldn't, but I have to give up most of that money." He started walking down and my brother followed him and met him downstairs in

front of the building. He must have pleaded with him too and he told him unless the money is delivered in Goldsboro by a certain time that it would be late.

Continued by F. R. Ginsburg

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**Government's Exhibit 9.**

Stenographer's notes, pages 155-163—Neisner.

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**Government's Exhibit 10.**

3692

Statement of Samuel Bayer—Feb. 7, 1945—44 pages.

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**Government's Exhibit 11.**

STATEMENT

OF

SAMUEL BAYER

(continuation of statement taken by steno. F. M.)

Steno. F. R. Ginsburg

February 7, 1945

3693

Present:

EDWARD C. WALLACE,
Assistant U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY
Attorneys for witness

GERALD FLYNN
J. I. BROWN
Federal Bureau of Investigation

3694 *Government's Exhibit 11.*

*By Mr. Bayer.*

(answer continued)

The money was delivered. Then we got a letter from him, maybe a month later, telling us that he stopped off and that he was going further and so forth. He didn't address the letters to me. It was addressed to Miss Solomon and maybe about a month later there is another letter came and in it he said "You know, your brother Eli put one over on me. You still owe me more. Don't forget I still know the people in Washington. Everytime I have read the letters to me, I just tore them up. I hated to think of
3695 him.

*By Mr. Wallace.*

Q. That's the last time you have seen or heard of Radovich?

A. Yes.

Q. Mr. Bayer, there is certain preliminary questions I want to ask you. Where and when were you born?

A. In Russia.

Q. When?

A. To the best of my knowledge, February 15, 1891.

Q. How many brothers have you?

A. I have three brothers besides me. Four brothers.

Q. The oldest is Julius Bayer?

3696 A. The oldest is A. L. Bayer.

Q. And then comes Julius Bayer?

A. Yes, and then comes myself and then Elias.

Q. He is the youngest?

A. Yes.

Q. Have you any sisters?

A. Yes.

Q. How many?

A. Three.

*Government's Exhibit 11.*

3697

Q. What are their names?
A. One is Ida Usdan, Bessie Goldsmith, Ethel Cohen.
Q. You are married?
A. Yes.
Q. And how many children have you?
A. I have got three sons.
Q. That's Martin (interrupted by witness).
A. Robert Bayer is the oldest, Martin is the middle one and Sanford is the baby.
Q. How old is Robert Bayer?
A. 24.
Q. Is he in the Army?
A. Yes, sir.

3698

Q. Where is he stationed now?
A. In Texas.
Q. Where was he stationed before he went to Texas?
A. Middletown, Pa.
Q. In the Air Corps?
A. Air Corps Finance.
Q. Where was he before?
A. At Mitchell Field.
Q. The youngest boy, how old is he?
A. He is going to be 18, June 1st.
Q. And you have a nephew named Melvin Usdan, and has Mrs. Goldsmith a son?
A. Yes, sir.
Q. What's his name?

3699

A. Justin Goldsmith. She has two sons.
Q. One is Justin?
A. Yes, and one, Sonny they call him.
Q. Was Justin in the Army?
A. Yes, sir.
Q. Where was he stationed?
A. He was stationed originally at Mitchell Field and then for awhile in Middletown and then he was transferred to another place in Delaware.

3700 *Government's Exhibit 11.*

Q. How old is Justin?
A. I don't know, sir.
Q. He is not in the Army now?
A. No, sir, he was discharged.
Q. Medical discharge?
A. Yes, sir.
Q. Has Mrs. Cohen any children?
A. Two daughters.
Q. Has Julius Bayer children?
A. One son.
Q. How old is he?
A. Honestly, I don't know.
3701 Q. He is in the Army?
A. No, sir.
Q. Has A. L. Bayer any children?
A. Yes, sir, one son.
Q. Is he in the Army?
A. No, sir.
Q. When did you arrive in this country?
A. In 1907, I believe.
Q. And when did you become a citizen?
A. I became a citizen, I think it is about 12 or 14 years.
Q. That would be about 1930, 1932?
A. More than that. I know it is in the 20's.
Q. You were in the last war?
A. Yes, sir, I was discharged.
3702 Q. How long were you in the Army?
A. About three weeks.
Q. About three weeks?
A. Yes, sir.
Q. Now, when did your son Martin Bayer go into the Army?
A. He went in in the month of December.
Q. 1942?
A. 1942.

Q. And Melvin Usdan, when did he go in?

A. The same time.

Q. Did they volunteer?

A. Yes, sir.

Q. And where did they present themselves for induction?

A. At Grand Central Palace.

Q. Where were they sent from Grand Central Palace?

A. Camp Upton.

Q. In New Jersey?

A. No.

Q. Long Island?

A. Yes, sir. 3704

Q. How long did they stay in Camp Upton?

A. I think about a week or ten days.

Q. Did they report on the same day to Grand Central for induction?

A. Did they report?

Q. Yes.

A. No. I drov them out there. They had their privilege that either go from Grand Central or use their own transportation, so I drove them out there.

Q. But they went in on the same day?

A. Yes, sir.

Q. Melvin Usdan lived in Brooklyn?

A. No, he lives in Lawrence.

Q. In Lawrence too? 3705

A. Yes, sir, they are neighbors.

Q. How long did they stay in Camp Upton?

A. About a week or ten days.

Q. And then where were they assigned?

A. Mitchell Field.

Q. How long did they stay in Mitchell Field?

A. Until they were transferred out to Westover Field.

Q. Do you remember when that was?

A. About seven months, I think, I am not sure.

Q. That would mean they were transferred in July, 1943?

A. July or August.

Q. July or August, 1943?

A. Yes, sir.

Q. Your son Martin went to Westover Field?

A. Bradley Field.

Q. That's in Connecticut?

A. Yes.

Q. And Melvin Usdan went to Westover Field?

A. Yes. Westover Field in Massachusetts.

Q. Now, what officers have you met who were stationed
3707 at Mitchell Field?

A. The officers I met through my brother? Col. Jacobson, Col. Vidal, Lt. Roser, Capt. Radovich.

Q. Any others?

A. And I knew of a friend of mine, Capt. Kogan.

Q. Anyone else?

A. That's all.

Q. You never met any other officers?

A. No.

Q. Are you sure you never met any other officers?

A. Positively not, sir. Wait a minute. I think Capt. Radovich brought up to the place once a captain. I think his name was Englehardt or Engelbardt. I only met him once and I never seen him since.

Q. Have you ever met any other officers in Mitchell
3708 Field?

A. No.

Q. You are positive?

A. Yes.

Q. Who was the first of these officers that you met?

A. When I met Captain Kogan, at that time he was a Top-Sergeant or a High-grade Sergeant.

Q. When did you first meet Captain Kogan?

A. I met Captain Kogan when my oldest boy was stationed at Mitchell Field. I met him through my boy.

(At this point Mr. McGohey came into the room and was present during the examination of witness)

*By Mr. Wallace*

Q. Was that sometime in the year 1942?

A. It must have been the very beginning of 1942 because my oldest boy went in about six months or eight months prior to my younger boy.

Q. And where did you first meet Kogan? 3710

A. My oldest son brought him up to the house.

Q. And did you continue to meet him after that?

A. We became very friendly, sir.

Q. Did you see him any place besides in your house?

A. I used to go up to his house with my wife.

Q. Where did he live?

A. He lived in Garden City.

Q. Any place that you met him besides Garden City?

A. I met him no place. He sometimes came to my place when he was down in the city to say hello to me.

Q. Where was your place?

A. 30 West 21st St.

Q. Did he visit you in your home in Lawrence?

A. Yes, occasionally.

Q. Did you have any beach privileges anywhere? 3711

A. Beach privileges? We always—Mr. Wallace, we always take a locker.

Q. Where?

A. When we lived in Far Rockaway we used to be in Far Rockaway. When we moved to Lawrence, we were only there for one year practically, we took it now,—personally, I never go bathing, Ostend. Beach.

Q. Did you ever meet Kogan and his family at the beach?

A. Never.

3712 *Government's Exhibit 11.*

Q. You never met them in Far Rockaway?

A. Yes, sir. In Far Rockaway, he came up my house.

Q. Did Kogan have a locker at the beach? A. No, sir. Not that I know of.

Q. Did he ever use your locker? A. Not that I know. Never. I can positively say never. I don't remember the time when he was at the beach.

Q. Who was the next officer you met?

A. Colonel Jacobson.

Q. Where did he meet you?

A. He used to come up to visit my younger brother and I met him in my place. Colonel Vidal.

3713 Q. Did you meet Col. Jacobson and Col. Vidal at the same time?

A. No. First I met Col. Vidal and Lt. Roser.

Q. And where did you meet Col. Vidal and Lt. Roser for the first time?

A. In my place.

Q. When you say in your place, you mean the Plymouth Yarn and Thread Co.?

A. Yes, sir.

Q. And your brother Elias introduced you to Vidal and Roser?

A. Yes.

Q. And when was that?

A. I know it was in the summertime.

Q. 1942?

3714 A. It must be, sir, or 1943. I honestly don't know. They used to come in with their light suits.

Q. And did you have any conversation with your brother about Vidal and Roser before you met them?

A. Yes. He told me that they couldn't get uniforms wholesale and whether I would have any objection if they would be sent down to I. Buss and see if I could get them wholesale prices so I said "why not".

3715

Q. Did he tell you where they were stationed at the time?

A. Yes, sir.

Q. What did he say?

A. He told me that he met those officers, that they are stationed at Mitchell Field; that they are very nice fellows.

Q. Did he say where he met them?

A. Yes, sir. He met them at a cabaret place called Copacabana.

Q. Did he say how he met them at the Copacabana?

A. I really didn't question him. It didn't mean anything to me, Mr. Wallace. He said how he had met them; that was the end of it.

3716

Q. When you met these two officers, was it in 1942 or '43?

A. Mr. Wallace, so help me, I don't know whether it was '42 or '43.

Q. Was it before your son was inducted into the Army?

A. No. My son was already in the Army.

Q. Your son was inducted in December, '42?

A. Then it must have been '43.

Q. In what month did you meet (interrupted by witness).

A. It was towards the early spring or summer.

(Off the record)

3717

Q. At the time you met Vidal and Roser, your sons were stationed at Mitchell Field?

A. Yes, sir.

Q. And what was your conversation with Vidal and Roser when you first met them?

A. Vidal and Roser? We were taking a drink; they were drinking and I joined them; took a drink with them.

Q. In your office?

A. In my office. Talking. Different things, you know.

Q. About what?

A. Oh, generally. About different things. It was not anything of importance.

Q. Was it about the war?

A. The war, I suppose. I really can't tell you what was said. It was of no importance as far as I was concerned. They were very fine people.

Q. Did they know your son was stationed at Mitchell Field?

A. Yes.

Q. Did you tell them?

A. Maybe I did, sir. Maybe I did.

3719 Q. And what did you say to them and what did they say to you about your son?

A. Colonel Jacobson passed a remark.

Q. You haven't met Colonel Jacobson.

A. Vidal?

Q. Yes.

A. They were asking me about where the boys were on the field. That's was all there was to it.

Q. Did they ask you what outfit they were stationed with?

A. I don't think Vidal did. I don't think so, sir.

Q. Did Roser?

A. I don't think so either, sir. I don't remember.

Q. You didn't volunteer to tell them what outfit your boy was with?

3720 A. No.

Q. How long after you met Vidal and Roser did you meet Jacobson?

A. Maybe a couple of days.

Q. Who introduced you to Jacobson?

A. He walked in with them, the three of them, if I am not mistaken. Jacobson and Roser and Vidal.

Q. Had they gone to I. Bus up to this point?

A. They went to I. Bus even before I met them. My brother sent them up there.

Q. What was the purpose of visiting your office?

A. They used to come up and visit my brother and take a drink and I used to join them, as I said, and they had ordered their uniforms of I. Bus. They had already ordered their uniforms. My brother had already sent them to get their uniforms.

Q. Had the uniforms been delivered yet?

A. No.

Q. A few days after you first met Vidal and Roser, then Jacobson came up to your office with Vidal and Roser? 3722

A. Yes, if I am correct. I am almost sure.

Q. That would be in the late spring or early summer?

A. Yes.

Q. Had you ever met Jacobson before?

A. No.

Q. You never knew him before?

A. No.

Q. What was your conversation with Jacobson, Vidal and Roser on the second visit to your office?

A. Mr. Wallace, nothing of any importance. Nothing of any importance that I could take notice or take stock. I was not interested. I just—they came up and looked very highclass fellows and I was just congenial to them; that's all. Liquor don't mean anything to me. There is plenty of it. Anybody can come up and take a drink with me. 3723

Q. After this second visit, did you meet any of these officers again?

A. Mr. Wallace, the three of them used to come up. I won't say very often. Maybe once a week or maybe once in ten days that I would see them. Not very often, sir.

3724 *Government's Exhibit 11.*

Q. Would they stay in your office or Elias' office?

A. In my office. I happen to have the nicer of the offices there and the liquor is in my office. I happen to have a little, what you put your telephone on, the door is opened and the liquor is there.

Q. Would you say the reason they came to your office was to sit around and drink?

A. As far as I know, sir.

Q. When did you first meet Radovich?

A. I met him after the boys were transferred over to Jacobson's company.

Q. Tell us how—you told us before that Jacobson said
3725 to you that he needed some clerks in his outfit?

A. Jacobson started to talk about the boys. I don't know how the conversation came about. And he said to me, "Say, Sam, what are the boys doing on the field". I told him they were clerks. I think my brother Elias told him the same thing. So he said, "Say, I need some clerks in my department". To me it didn't make any difference whether they were in his department. I don't know what department meant. It was on the same field, and I felt he was a friend, why not be under him. I said "I didn't mind. I don't care. If you want them, go ahead". The next I heard they were transferred.

Q. When was that?

A. During the summer.

Q. Was it June or July?

3726 A. Honestly, Mr. Wallace, I would not be sure to tell you what months they were. I don't know.

Q. You told us before that you thought they had been transferred from Mitchell Field in July or August so it must have been before.

A. I know it was in the summer time. I know it was in the summer.

Q. Tell us when you first met Radovich?

A. Captain Radovich came in, my best recollection, with Lt. Roser. He introduced me to him and Radovich said to me "I understand that you have a brother-in-law in the uniform business" and I said "yes". He said "I will try to get uniforms too." I said, "go ahead, he will sell it to you. I am sure he will sell it to you. I am sure he will get you a wholesale price on that".

Q. How long after you first met Vidal, Jacobson and Roser did you meet Radovich?

A. About a month.

Q. Had the uniforms been delivered to Vidal, Jacobson and Roser? 3728

A. Not to my best recollection.

Q. How long did it take to make those uniforms?

A. He had a hard job of getting the cloth. I think it was delayed. They might have gotten it sooner than I know.

Q. Did you call up Busch before Radovich went up to see them?

A. I might have.

Q. Who would you speak to?

A. To any of the boys; Joe or Phil or Harold. I really don't remember. I presume I did, I told them Capt. Radovich is coming up and they should treat him right.

Q. He went up alone?

A. Maybe my brother Eli went with him. I am not sure.

Q. When did you next see any of these officers? That you saw Radovich? 3729

A. Captain Radovich started to come up very often.

Q. Alone?

A. Alone. Many a times he would come up with a chauffeur.

Q. Would he ever come with Vidal?

A. Yes.

3730 *Government's Exhibit 11.*

Q. Would he come with Jacobson?

A. Yes, sir, a couple of times that he was there I saw Radovich. In other words, it was this way I imagine. I am positive Capt. Radovich came after they were in my office. In other words, Vidal and Jacobson and Roser would be there and he would walk in there, like, after they were there; but he never would come—not that I remember, that they would come with him. I know they were together at one time.

Q. Eventually, the uniforms were made and delivered to these different officers?

A. Yes, sir.

3731 Q. Did they pay for them?

A. No, sir.

Q. Busch called you and told you that they had not been paid for?

A. Yes, sir.

Q. Whose uniform was delivered first?

A. I don't know which one was delivered first. I can tell you this, when the uniforms were delivered (interrupted by Mr. Wallace).

Q. They were delivered at the same time?

A. I don't know whether they were. I didn't check into the records so I don't know, but I can tell you this. There were a lot of complaints, specially from Capt. Radovich and Lt. Roser.

3732 Q. One minute. The uniform was delivered to Vidal?

A. Yes, sir.

Q. Did he pay for it?

A. No, sir.

Q. Did you call him to pay for it?

A. I hinted to him that the boys wanted, you know, they wanted to get paid, in a nice way. I didn't say to them (interrupted by Mr. Wallace).

Q. I mean Vidal?

A. When I said it, Mr. Wallace, they all heard that I passed a remark to my brother. You know, this Harold is after me for the money. They knew what it was.

Q. You said to your brother Eli that Harold Busch wanted you to pay for the uniforms. Is that correct?

A. Pardon me, sir.

Q. Did you say substantially to your brother Eli that Harold Busch wanted you to pay for the uniform?

A. I said to him, Harold asked for the money for the uniforms.

Q. Who was present there when you said that?

A. Vidal, Jacobson and Roser. 3734

Q. Radovich was not there?

A. I don't think so.

Q. And they knew you were talking about a payment for the uniform?

A. Whether they heard, I don't know. If they didn't want to hear, I don't know that.

Q. Is there any reason why you should not ask Vidal and Jacobson and Roser to pay for the uniform?

A. It was, you know. I thought they couldn't afford it. I thought they came to me in a better position. They know I am not making the uniforms and they went up and I told them they could get it at wholesale price. They are not babies. If they came up and would say, "give me a spool of thread", it is one thing. They know I am not in the uniform business and when they went it was understood that they would get it at wholesale price. 3735

(relieved by steno. L. D.).

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**Government's Exhibit 12.**

Stenographer's notes—D'Elia—pages 39 to one-half of 46.

3736

**Government's Exhibit 13.**

Continuation of

STATEMENT

OF

SAMUEL BAYER

(Previously taken by Frances Rolnik Ginsburg, Stenographer)

(Continued by Lena M. D'Elia, stenographer)

(Same appearances as before)

3737

Questions by: EDWARD C. WALLACE,
Assistant U. S. Attorney

Date: February 7, 1945.

*By Mr. Wallace.*

Q. Is that the only time that you ever hinted to these officers that they should pay for the uniforms?

A. As far as I can remember, sir.

Q. They didn't pay for them?

A. No sir.

Q. You did?

A. Yes, sir, I did.

3738 Q. You paid for them out of the funds of the Plymouth Yarn and Thread?

A. Yes.

Q. Did you ever ask Radovich to pay for his uniform?

A. No.

Q. Was his uniform delivered to him?

A. Yes, sir.

Q. Do you know Mervin Levine?

A. I don't know him personally; I heard of him, yes.

Q. Who mentioned him to you?
A. I know my brother buys clothes there.
Q. Did Radovich buy any clothes there?
A. I believe he did.
Q. Do you know who took him there?
A. I believe my brother.
Q. Do you know who paid for the clothes?
A. I believe Radovich did; I didn't pay.
Q. How long after he went to I. Buss & Co. did he go to Mervin Levine?
A. I couldn't just exactly say because I do not remember, the time lapsed.
Q. Do you know he went to Levine? 3740
A. When those suits were made for Radovich, he complained, he couldn't use them, too tight, something, and he kept on complaining until I myself went up with Roser, and I said to him, why don't you go back and let him fix it for you; they went, fixed and fixed, still no good; I said let me go up with you; I know I could do him a favor and see if it couldn't be fixed right, and my brother-in-law jumped on me, I think it was Joe there; He said those uniforms fit wide; he said look I don't know much about uniforms—they both got so they dropped the uniforms on the table and went away.
Q. Who went away?
A. Roser and Radovich.
Q. So they didn't take the uniforms from I. Buss?
A. No sir. 3741
Q. Was that the end, as far as you were concerned?
A. Yes.
Q. How did he happen to go to Levine?
A. Maybe my brother Ely took him there.
Q. You never asked Radovich to pay for the uniform he didn't take.
A. As far as I live, the uniforms were returned anyway.

3742 *Government's Exhibit 13.*

Q. Did you ever see any of these officers outside of your place of business?

A. Mr. Wallace, once I had dinner with Colonel Jacobson.

Q. Where?

A. At the Waldorf, his wife, my wife, and him; once I had dinner with Captain Radovich, his wife, my wife, and Miss Solomon, at the Waldorf; it happened Radovich brought his wife to my place and Miss Solomon was in the office, nice little woman came from California, so she asked her if she wouldn't mind having dinner with us in New York and she accepted the invitation.

3743 Q. Was this while your boys were out at Mitchell Field?

A. Yes.

Q. Did you ever buy anything else for Radovich besides uniforms?

A. Mr. Wallace, Captain Radovich had such a way about himself; every time he would notice something in the office, for instance I traveled quite a bit, and he would look at my bag, he would say it is nice, would like to get one, I remember I got him one.

Q. Where, from the Cornell Luggage Co.?

A. Yes.

Q. Anything else you purchased for Radovich?

A. I want to finish this; I don't know what makes me think he didn't like the little bag, and he went to the luggage company, how much he took there I don't know; I said how
3744 did you get the name—evidently the name was on the bag, and he got himself a set there, I think.

Q. Did you pay for the set?

A. Yes, sir, I did.

Q. Was there anything else you purchased for Radovich or his family?

A. For his family, no sir. The last I heard was my brother-in-law called me—Trousseau Uniform Co., he is bothering me—Captain Radovich took pillow cases and

towels with initals on—got some embroideries—I said who took him there, I said how did he know about that place—he came up one day to me and I told him there they—(interruption here——

Q. Which brother-in-law?

A. Phil, as a matter of fact he asked Phil to introduce—Phil Busch took him up there and he introduced him to this fellow I never met before in my life, never had any business with him and he ordered whatever he ordered.

Q. Did you pay for them?

A. He was after Phil, I believe, and Phil came to me, I bawled the devil out of him why he took him there.

Q. Was this after he returned the suit to Busch?

A. I believe it was; I don't know whether this is after or before.

Q. When was the first time that you paid him money?

A. First time I paid him money I knew in the summer time.

Q. Do you remember what month?

A. I don't sir.

Q. You paid him $450.?

A. Yes, I gave him $450.

Q. At that time your boys were at Mitchell Field?

A. Yes.

Q. Were they in Radovich's company?

A. I presume they were; they were working for Lieutenant Roser's office.

Q. Did Radovich make any threats as to what he would do to the boys if you didn't give him the $450.?

A. No, when he asked me the first time he turned to me and said, I have a new angle, and I can put the boys into the medical—he asked me that he needs $500. to send his wife to California.

Q. He made no threats?

A. No, sir, not at that time.

3745

3746

3747

3748 *Government's Exhibit 13.*

Q. You gave him the $450. the following day?

A. Yes.

Q. Did you have the $450. in your pocket?

A. Mr. Wallace, my reputation is such that I can always get money.

Q. I am interested where you got this $450.?

A. I had $450.—if I didn't have it in my pocket I had it in my place.

Q. You got it from funds available?

A. Yes.

Q. You didn't borrow it?

A. I don't have to do that.

3749 Q. About a week or so later you gave him $500.?

A. No, Mr. Wallace, he came to me about a week later and told me he needed $500. more; then I didn't give it to him—well, I told him I would get it together, I didn't give it to him then; I didn't want to give it to him.

Q. How long after you gave him the $450. would you say that you gave him the $500?

A. He came the third time and he told me that he needed another $1000. because the [redacted]plication fell through and he had to give up $1000, and I—I didn't give him the $1000. the kids would go overseas. I still then didn't give him any money.

(At this point of statement continued by Celia Reitman, Stenographer.)

3750

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**Government's Exhibit 14.**

Stenographer's notes—Reitman—pages 1 to 15.

3751

**Government's Exhibit 15.**

Continuation of

STATEMENT

OF

SAMUEL BAYER

(Previously taken by Frances Rolnik Ginsburg and Lena M. D'Elia)

(Continued by Celia Reitman, Stenographer)

February 7, 1945.

3752

(Same appearances as before)

*By Mr. Wallace.*

Q. I am trying to fix the time when you did give him the second $500.

A. The second $500.—it was in the summer time.

Q. How long after you gave him the first $450.?

A. I imagine about three weeks.

Q. And you met him on the corner opposite Radio City?

A. I waited right in the entrance to Radio City.

Q. Is that the Music Hall Theatre?

A. Yes.

Q. And he came into the Music Hall Theatre and met you in the lobby? 3753

A. Yes, sir.

Q. And then you went into his car?

A. His car was parked in the side street.

Q. Where did you drive to?

A. I didn't drive with him.

Q. Just sat in the car?

A. Sat and gave it to him and went away from him.

Q. Where did you get the $500. that you gave to him?

A. Mr. Wallace, I always try to have a lot of money. I have money. I always have money—some money saved up too.

Q. How long was it after you had given him the $450.?

A. How long after?

Q. Yes?

A. It must have been about three weeks. I am not sure exactly. About that.

Q. Then the next amount you gave him was—?

A. $400.

Q. $400.?

3755 A. That's right, Mr. Wallace.

Q. And was that passed to him in his room in the St. Moritz?

A. Yes. He took me up to his room.

Q. How long after you gave him the $500. outside the Music Hall did you give him the $400.?

A. Maybe three or four days later.

Q. The next amount was $600.?

A. That's right.

Q. How long after you gave him the money in the St. Moritz did you give him the $600.?

A. About three or four days; maybe five days.

Q. Where did you give him the $600.?

A. In my office.

Q. Where did you get the $400. that you gave him in the

3756 St. Moritz and the $600. that you gave him in your office?

A. I took some from my wife. I have a brother-in-law who always gives me some money to hold for him.

Q. Which brother-in-law?

A. Goldsmith.

Q. How much did you use of Goldsmith's money?

A. Well, I owed Goldsmith quite a lot of money. From time to time, every time he has any money left that he—more than he has to give home, he would give it to me to

hold it for him, I would really ask him to give it to me to hold for him because I felt that if there is anything—God forbid—wrong in the family, and if he did not have it, he would come to me anyway.

Q. How much of Goldsmith's money did you give to Radovich?

A. I don't know. Maybe a couple of hundred dollars. I have my own too.

Q. Did you tell Goldsmith that you were going to use his money?

A. No. I did not tell Goldsmith at all.

Q. How much did you get from your wife?

A. I got from my wife $500. 3758

Q. Did you tell her for what purpose you were getting it?

A. No.

Q. How long after you made the last payment in your office of $600. did you pay him the $5,000. down in Goldsboro?

A. Mr. Wallace, when I gave him the last payment, the boys were then transferred to the medical in Mitchell Field. They were there for a week. They were in Westover Field, I think, for about three or four months, and when I gave him the last $5,000., it was the time when the boys were in Goldsboro.

Q. Would you say it was about a month?

A. No, Mr. Wallace. I am trying to explain you, sir. From the time that I gave him the last $600. the boys were 3759 then transferred to the medical in Mitchell Field. They were there for a week or so. Then they were transferred to Westover Field and Bradley Field. They were on Bradley Field for about three or four months, I think.

Q. Three or four months?

A. Yes, sir, I think so. When I gave him the money I gave it at the time when the boys were transferred out of

3760 *Government's Exhibit 15.*

Westover Field. It must be at least three or four months, the way I got it.

Q. Did you give the $5,000. to Radovich?

A. No, I did not.

Q. Who did?

(Mr. Keenan has advised his client in connection with his answer to the last question.)

Q. Who passed the $5,000. to Radovich in Goldsboro, North Carolina?

3761 (Mr. Keenan states that he has advised Mr. Bayer for the time being not to reply to that question, more than to say that he admits that he furnished the $5,000. that was paid by his direction to Radovich by another person who has been charged with the offense and represented by counsel, but other than that I don't know and, therefore, I don't want to take the responsibility of advising him with reference to this other person, and he, for the time being, does not desire to answer that question to implicate someone else.)

Q. Where did you get the $5,000.?

A. I got it from my brother-in-law.

Q. Which one?

Q. Goldsmith.

3762 Q. How much did you get from him?

A. About $1200.

Q. Did you tell him for what purpose you were getting it?

A. No, I did not.

Q. How long before the money was passed did you get the money from Goldsmith?

A. How long?

Q. Yes, how long?

A. It was practically the same day.

Q. Where did you get the rest of the money?
A. I got from my wife.
Q. How much?
A. Over $2,000.
Q. Did you tell her what the purpose of getting the money was?
A. I did not.
Q. When did you get it from her?
A. The day before it was going there.
Q. Where did Mrs. Bayer get the $2,000.
A. She has money saved up.
Q. Did she get it from a bank?
A. No. She had it in a vault. 3764
Q. In a safe deposit vault?
A. Yes.
Q. Where did you get the balance of the $5,000.?
A. I got some money from my sister.
Q. Which one?
A. Mrs. Yusan (?)
Q. How much did you get from her?
A. About $700.
Q. She knew what you were getting the money for?
A. No, she did not.
Q. Was the money to protect her son as well as your son?
A. No. It was my son.
Q. Not her son?
A. It was my son. 3765
Q. What did you do with the $5,000. after you received it?
A. I got it together. I gave it to someone.
Q. Did you give it to Elias? A. No, I did not.
Q. You did not give it to Elias?
A. No.
Q. Did you give it to someone else?
A. Yes.

3766 *Government's Exhibit 15.*

Q. Did you talk with Elias at the time that you gave the $5,000. to someone else?

A. Yes.

Q. Was Elias present when you passed the $5,000.?

A. No, sir.

Q. What talk did you have with Elias?

A. I told him that I gave this up and that he would go with him.

Q. That Elias would go with him?

A. Yes.

Q. Was anything else said?

A. No.

3767 Q. Did Elias go with this other person?

A. Yes.

Q. How long after you gave the money to this other person did you again see Elias?

A. It was the same day, sir.

Q. And then Elias left and went down to North Carolina?

A. Yes.

Q. And he came back to New York?

A. Yes.

Q. Immediately?

A. I don't know whether it was immediately.

Q. Did he go to any of the mills there?

A. I am not sure whether he came back the same day.

Q. What did Elias say to you when he came back from North Carolina.

3768 A. It was delivered.

Q. Did he say anything else?

A. That's all.

Q. Was anything else delivered besides the money?

A. No, sir.

Q. Are you sure of that?

A. Positive, sir.

Q. Now, at the time that Radovich told you that if you did not pay the $5,000. he would take the boys to Burma, did you discuss the transfer of those boys with any other officer?

A. No, sir. The only thing I did, I went to Captain Kogan, once when the boys were transferred to the air-borne engineers and I didn't know what airborne meant and being he was a friend of mine, I asked him, "Captain, tell me, what does airborne mean. Does it mean flying? You know my kid never flew in his life", and he said "No, they don't fly".

Q. You discussed the different transfers of the boys with Radovich, haven't you? 3770

A. Pardon me, sir?

Q. Maybe you don't understand me. You spoke to Radovich about the transfers into the medical corps at Mitchell Field?

A. He told me to transfer them there.

Q. You spoke to Radovich about transfers in connection with his expedition to Burma?

A. No, sir.

Q. He discussed it with you?

A. At the time, in 23rd Street, when he came, and he told us that a couple went out; that he is taking the kids over.

Q. He, Radovich, spoke to you about having the boys transferred from Westover Field and Bradley Field?

A. Back to Mitchell Field.

Q. And you spoke to Jacobson on one occasion or Jacobson spoke to you about transferring the boys from one outfit to another? 3771

A. That's right.

Q. Apart from these conversations, did you talk to any other officer about transferring your son and Yusan?

A. No, sir.

Q. You are sure of that?

A. Positive.

Q. You bought and paid for theatre tickets for Jacobson?

A. Not as I know of. I have a charge account there with the theatre ticket office and I know I never heard the name of Jacobson for theatre tickets, but I know I heard the name of Radovich for two tickets for the theatre.

Q. Did you ever entertain Jacobson at the theatre?

A. Never. Never went to the theatre with him myself.

Q. Did you ever pay for any tickets that Jacobson used?

A. Personally, I don't know whether Colonel Jacobson got any tickets for the theatre.

Q. Did you ever pay for any tickets for prize fights or other sporting events that Jacobson used?

3773

A. Not as I know of for anything like that.

Q. Did you ever pay for any theatre tickets or tickets for sporting events for Vidal?

A. Not as I know of.

Q. Or Engelhart?

A. Engelhart I only met once in my life.

Q. Or Roser?

A. Not as I know of.

Q. Did you ever give Jacobson anything outside of the uniforms?

A. I believe that my wife,—he had two beautiful little girls—I think she sent him—I am not sure—I think she sent little dresses to his little kids, or candy.

Q. How about neck ties?

3774

A. No, sir.

Q. How about automobile tires?

A. No, sir.

Q. You are sure of that?

A. Absolutely.

*By Mr. McGohey.*

Q. Does this theatre account run into substantial figures?

A. We have customers and we entertain.

Q. At the end of the month, does it run into substantial figures?

A. About $50. or $60.

Q. Did you make any inquiry as to who got the tickets?

A. No, sir.

*By Mr. Wallace.*

Q. Did you ever speak to Colonel Vidal on the telephone? 3776

A. Yes.

Q. You have?

A. Yes, sir.

Q. On how many occasions have you spoken to Colonel Vidal on the phone?

A. Not very much.

Q. About how many?

A. Maybe half a dozen times.

Q. Did you ever phone him or did he always phone you?

A. He would phone for Eli and when Eli was not in the office I would answer.

Q. Did you ever phone Colonel Vidal?

A. No, sir.

Q. You are positive of that? 3777

A. Positive.

Q. You never phoned him out at Mitchell Field?

A. No, sir.

Q. Now, after Radovich got the first money from you, the $450., did you ever give him any presents?

A. I got the bags (?)

Q. After that.

A. After that? No, sir.

3778 *Government's Exhibit 15.*

Q. After you paid him the $450. did he ever get any present from you at all?

A. No, sir.

Q. Did you ever call Jacobscon a rat to anyone?

A. No, sir.

Q. Do you know Colonel Dykmeyers?

A. No, sir.

Q. Have you ever been down to the Middletown Air Depot in Pennsylvania?

A. Yes, I was there once.

Q. To visit your son, Robert?

A. That's right. I was travelling through there and
3779 stopped off.

Q. Did you ever meet any officers there?

A. Colonel Clarke.

Q. Did you have a conversation with Colonel Clarke?

A. Nothing of importance, sir.

Q. Did you offer him a job?

A. Offer him a job?

Q. Yes?

A. No, I did not.

Q. You are certain of that?

A. I am certain.

Q. Did you ever meet any other officers at Middletown, besides Colonel Clarke?

A. No, sir.

3780 (Continued by Miss Kravet)

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**Government's Exhibit 16.**

Stenographer's notes—Kravet—pages 179 to 189.

3781

**Government's Exhibit 17.**

EDWARD C. WALLACE,
Assistant U. S. Attorney,
in charge of case

Continuation of

STATEMENT

OF

SAMUEL BAYER

(From CR)

Steno. EPKravet
2-7-45

3782

*By Mr. Wallace.*

Q. Do you know Campbell?
A. Where, sir.
Q. Philadelphia.
A. No, sir.
Q. Do you know Edward A. Martin?
A. No, sir.
Q. In Washington?
A. No, sir.
Q. Do you know Celia Denninberg?
A. No, sir.

3783

Q. Did you only meet Colonel Clark once?

A. I met him quite a few times. He used to come to New York and whenever he was in New York we always would go out together.

Q. Who paid the bills?

A. I paid the bills. At times he paid the bills. I paid most of the time, sir.

Q. Did you ever give any present to Colonel Clark?

A. Maybe a Christmas present. I think we sent him once a wallet or something. On the other hand, he sent me presents that are more than I ever spent on him in my estimate.

Q. Have you ever seen Colonel Clark outside of Middletown and New York?

A. No.

Q. Have you any factories in North Carolina?

A. Yes, sir.

Q. Paterson?

A. Yes, sir.

Q. Did you ever meet Colonel Clark there?

3785 A. Yes, sir, once, that's right.

Q. Where did he stay in North Carolina?

A. He didn't stay. He came in the morning and went——

Q. What was the purpose of his visit?

A. He was interested. His wife came from the south and he was interested in a mill and he wanted to see how the yarn was made, so he came up and I showed him around.

Q. Do you know Colonel Lipkin?

A. No, sir.

Q. Do you know Sergeant Gross?

A. No, sir.

Q. Do you know Colonel Johnston?

A. No, sir.

Q. Now, you say that when Radovich phoned Miss Solomon he asked that Miss Solomon and you both meet him at

3786 the McAlpin Hotel?

A. That's right.

Q. And there was another lieutenant there?

A. Yes.

Q. Who was the lieutenant?

A. I don't know, sir. It was the first time I met him and the last time I met him. I only saw him——

Q. But it was at Major Radovich's request that Miss Solomon was present?

A. That's right, sir.

Q. On one occasion Radovich phoned Mitchell Field and promised he would bring him a flying jacket?

A. That's right. That's when he came and asked me for the thousand dollars.

Q. Who was the officer he spoke to?

A. I don't remember.

Q. Had you ever heard the name?

A. No, sir.

Q. You don't know what it is now?

A. I don't know. 3788

Q. And when you gave Miss Solomon instructions at the time that she made the appointment at the McAlpin or you said to her that she shouldn't have made the appointment?

A. That's right, sir.

Q. Now, Radovich phoned you again and said he wanted to meet you at Cavanaughs.

A. Radovich phoned——

Q. Miss Solomon.

A. —and he got hold of Miss Solomon on the telephone and he said that he had to meet me and her very very important; that he was flying in from Washington.

Q. And she made this appointment?

A. That's right.

Q. This was after you had told her that she shouldn't have made the appointment at the McAlpin? 3789

A. That's right.

Q. And it was at Radovich's request that Miss Solomon was present?

A. That I don't know, my friend.

Q. Didn't you just tell us——

A. She was talking to him on the telephone. She told me he wanted me and her to be there.

Q. After you met him was there anything that he had to say that dealt with Miss Solomon?

A. No, sir.

Q. Was there anything in the conversation which indicated the necessity of having Miss Solomon present?

A. No, sir.

Q. Now, after Elias went to Goldsborough with the $5,000 and he paid it did he telephone you from Goldsborough that he had made the payment?

A. I don't think so, sir.

Q. Did you ever give any golf clubs to Radovich?

A. Yes, sir.

3791 Q. When?

A. One day he walked into the place and I had a set of golf clubs for my kid, it was for my older boy and they were standing there. It's a good thing you— He looked at them. He said, "Gee, they're nice. I would like to have—can I have it? I'd like to go playing golf." I told him they belonged to my oldest boy. I said, you can have them and bring them back. He said all right. He took them. He never returned them.

Q. When was that?

A. During the summer.

Q. Before or after you paid him the $450.?

A. That was all before.

Q. Did you ever speak to Radovich about automobile tires?

3792 A. No, sir.

Q. Did you ever speak to Radovich about an apartment?

A. No, sir.

Q. Did you ever give any money to Colonel Jacobson?

A. Never.

Q. Do you know a man named Perdem?

A. Yes. I met him once.

Q. Did you ever buy a uniform for him?

A. No, sir. I don't think so, sir. No, definitely not.

Q. Is he stationed at Mitchel Field?

A. I met him through Captain Kogan.

Q. But you never bought him a uniform?

A. No, sir.

Q. You remember when someone from the Army came up and asked you whether you knew these different people?

A. Yes; sir.

Q. After that conversation with Colonel Miller did you have a talk with your brother Elias?

A. Mr. Wallace, there was once an officer came from Washington.

Off the record:

A. I'll tell you what happened. I was out of town when 3794
Colonel I think it was Hogan from Washington came in and I wasn't there. My brother Eli was not there. So he left word that my brother Eli should call him. So I think it was on a Monday Eli called him and told him that if he wanted to come in that we are ready to see him. But he said he couldn't make it, see, because I was out of town. I was going out of town then again, see. So he said that he would see him himself, see, and that he would see me some time later. So he came and he saw my brother Eli. I was out of town then; I was at the mill. And he asked Eli questions. Eli denied it.

Q. What questions did he ask?

A. Whether we gave any money. I think it was whether we gave any money to Radovich. 3795

Q. And Eli said he had not?

A. I think so.

Q. And you said you had not?

A. I hadn't seen him.

Q. Later on you denied giving any money to Radovich?

A. I denied it to Colonel Schneider.

Q. And then there were statements typed up to that effect?

A. Yes, sir.

3796 *Government's Exhibit 17.*

Q. And Miss Solomon typed up those statements, didn't she?

A. Yes.

Q. And after the Army officers left did Eli call Harold Bush?

A. Mr. Wallace I don't know.

Q. Did you have a discussion with Eli about the records up at I. Buss & Company?

A. No.

Q. The records were changed, weren't they?

A. That's what I understand.

Q. Who told you that?

3797 A. Miss Solomon told me.

Q. Who ordered them to be altered?

A. I don't know, sir. I didn't.

Q. Have you purchased any insurance of any kind during the year 1943?

A. Insurance? '43, yes.

Q. What kind of insurance?

A. Life insurance.

Q. How much?

A. I took out a policy, one for five and one for ten.

Q. And who was the agent on those policies?

A. The agent? I believe one was in Far Rockaway, a fellow that I know. I think it is Cohen. And the other one was Levy in New York.

Q. Who is Levy?

3798 A. Equitable Brokerage.

Q. Have you done business with Levy before?

A. Yes, sir. He is my insurance broker.

Q. And had you done business with Cohen before?

A. No, sir.

Q. How did you happen to place the insurance with Cohen?

A. Cohen, I know him for a long time. My wife knows him.

Q. What's his first name?

A. Honestly I don't know. He lives in Far Rockaway. He is a poor man.

Q. Where is his office?

A. I don't know. I think in Far Rockaway. As a matter of fact from the synagogue where I belong, see, you know, the former president asked me to give him a break. I knew, see, that I was rejected on account of my heart, and I told him; Mr. Smith, I says, there is no use, I wouldn't pass anyway. Oh, give him a break. So I gave him a $5000 policy. I didn't even think he would put it through. And he rated me up to an awful high——

Q. Was there any other insurance you placed in '43? 3800

A. No.

Q. Placed on any member of your family?

A. Mr. Wallace, except in insuring my little boy.

Q. How much?

A. $2500.

Q. Who was that placed with?

A. That was placed either through the Equitable or through this fellow Cohen. Honest, I don't know.

Q. Did you ever talk to anybody else about insurance of any kind in '43 besides Cohen and Levy in the Equitable?

A. Positively not. I don't know anybody.

Q. You are sure that nobody spoke to you about insurance?

A. I am positive, Mr. Wallace.

Q. Did you ever obtain a copy of any of the transfer 3801 orders of your son?

A. I don't know what you mean, sir.

Q. Your son was transferred from different posts, wasn't he?

A. You mean from Mitchell Field.

3802 *Government's Exhibit 17.*

Q. He was transferred from Mitchell Field to Westover, and from Westover to somewhere else. There were a number of transfers.

A. That's right; when the boy used to come home. Mr. Wallace.

Q. Did you ever obtain a copy of any of the transfer orders?

A. No, sir.

Q. Did you ever try to obtain copies of the transfer orders?

A. The only time I used to see the orders when the boy used to come home, regular typewritten orders, and his
3803 name would appear and a lot of other names.

Q. Did you ever speak to any officer about obtaining a copy of transfer orders?

A. No, sir.

Q. You are sure of that?

A. Positively, sir.

Q. Did you ever tell an officer that you would do anything to keep the boys out of the fighting area?

A. I never did, sir. There was no occasion for me to say that.

Q. Did you ever pay any bills at the Park Central Hotel?

A. No, sir, I didn't.

Q. What?

A. I don't think so, sir. Not as I know.

3804 Continued by Miss E. L. Celander.

3805

**Government's Exhibit 18.**

STATEMENT

OF

SAMUEL BAYER—
Cont'd from EPK

Present:

EDWARD C. WALLACE,
Ass't. U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY,
Attorneys for Witness

3806

GERALD FLYNN
J. I. BROWN,
Special Agents, F.B.I.

Stenographer: E. L. Celander,

Date: February 7, 1945

*By Mr. Wallace.*

Q. Did you at any time ever call Major Radovich on the telephone?

A. I don't remember.

Q. You may have called him?

A. I might have but I don't think so.

3807

Q. Did you ever telephone Col. Jacobson?

A. No, sir.

Q. Sure of that?

A. Positive.

Q. Never spoke to Col. Jacobson on the telephone?

A. The regular way. He probably would call Eli and Eli wouldn't be in the office and I would tell the girl "I will talk to him."

3808 *Government's Exhibit 18.*

Q. Did Col. Jacobson ever reverse the charges on any of the long distance calls he made to you?

A. I can't answer that. I don't know.

Q. Did Radovich ever phone you?

A. He did.

Q. After the money was paid?

A. After the $2,000. was paid.

Q. After the $5,000. was paid?

A. Yes.

Q. Did he ever reverse the charges?

A. If he did I wouldn't know. In my place it is such that we get a lot of collect calls from different customers. A
3809 customer calls me for goods, he calls collect. My telephone bill is usually three to four hundred dollars a month. We don't keep any particular system of what calls are what. What came collect, I don't know.

Q. Who would accept the calls?

A. We have a little girl there at the switchboard.

Q. Does she accept calls without consulting anyone?

A. Yes.

Q. What is her name?

A. Edith, we call her.

Q. How long has Miss Solomon been in your employ?

A. Five years.

Q. How much salary did you pay her when she went to work for you?

A. $18.00.

3810 Q. Five years ago she was paid $18. a week?

A. Something like that.

Q. How much is she getting now?

A. She was getting $35. from Plymouth Thread, their share and $30. from Thread Converters.

Q. She was getting $65. a week?

A. I don't know. I give her a raise. I don't know if she was getting $70 a week or $65.

Q. Have you a safe deposit box?
A. Yes.
Q. How many?
A. One.
Q. Where is it located?
A. Irving Trust Company.
Q. Which branch?
A. On 21st Street and Fifth Avenue.
Q. Has Miss Solomon a safe deposit box?
A. As far as I know yes:
Q. Has Eli?
A. I think so.
Q. Has your wife one? 3812
A. Yes.
Q. Where?
A. Far Rockaway National Park, I think.

(Adjourned).

3813

3814

**Government's Exhibit 19.**

STATEMENT

OF

ELIAS BAYER
333 West 86th Street,
New York, N. Y.

Present:

EDWARD C. WALLACE,
Ass't. U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY,
3815 Attorneys for Mr. Bayer

GERALD FLYNN
J. I. BROWN,
Special Agents, F.B.I.

Stenographer: E. L. Celander
Date: February 7, 1945

*By Mr. Wallace.*

Q. Mr. Bayer, you have spoken to your attorney about coming in here and making a statement in connection with the matter in which you were arrested some months ago?

A. Yes.

Q. They have advised you to make this statement?

3816 A. Yes Sir.

Q. You are making it voluntarily?

A. Yes sir.

Q. You understand anything you might say might later be used against you in a criminal proceeding?

A. Yes Sir.

Q. You don't need to say anything if you don't want to?

A. Yes Sir.

*Government's Exhibit 19.* 3817

Q. Will you tell us the story in relation to Radovich?

A. Well, Sir, I originally met Lt. Col. Vidal and Lt. Roser. I met him by accident in a night club at the Copa Cabana. We had several drinks together and became quite chummy at the same time. In the course of conversation, I don't recall whether it was Lt. Roser or Lt. Col. Vidal. He asked me what business I was in. I told him I was in the thread business. One of them asked me was it the little spools of thread you buy in the store. I said "No, we cater to the manufacturing trade, people who make uniforms, clothing; volume business." One of them said "You must sell these people who make uniforms." I said "We do. We do a lot of business with the Government." 3818 One of them said "Well, can you get it wholesale. Can you save us some money on the purchase price?" As to the time, Sir, it was some time in the early part of 1943. I don't recall the date. The month, the particular time. It was just one of those nights, where I lived with two other friends of mine. I met them and with another friend of mine on one of the nights we went out. I didn't hear anything from either one of them. About a month later I think it was Lt. Col. Vidal called me on the phone at my office and asked me if I would take him up to that wholesale place we were talking about at the Copa Cabana. I said "I will be very glad to. You come up to my office." Roser and Vidal came in, I believe the following day and I asked my brother if he would mind if I took them up to my brother, so they could buy at wholesale price. He said "Sure, I don't 3819 mind." I took them up to I. Buss Uniform Company and they were both fitted for uniforms.

Q. Did you speak to anybody up there?

A. I don't remember if it was Mr. Phil Buss or Harold Buss.

Q. What did you say to him?

A. I introduced him to the two officers and I told him I would like him to sell them uniforms at wholesale price

3820 *Government's Exhibit 19.*

and save them as much money as possible. They were friends of mine. They were fitted for uniforms and they left. That evening they came up to my apartment.

Q. Where was your apartment?

A. I shared an apartment with two friends of mine, 120 Central Park South. A short time thereafter Lt. Roser brought in Lt. Col. Jacobson. He introduced me to him and he also told me that Col. Jacobson would like to get some uniforms, also that it is very hard to get them at the P.X. at Mitchell Field. I said "Certainly, I will be glad to help you." And I took him up and he ordered a uniform. After that we became very friendly and these
3821 army men came up to my apartment very often. They would wash up and go out for drinks or for appointments. We had dinner together. Sometimes they would pay or I would.

Q. Where would you take them?

A. Hickory House or a night club.

Q. What night club?

A. Martinique or Copa Cabana.

Q. Did you ever introduce them to any of the entertainers?

A. No Sir, I did not. I don't know any of them. As a matter of fact, Radovich wanted to take me up to introduce me to the Ritz Brothers. I said I wasn't interested.

Q. Did you ever meet Jimmy Durante?

A. I have seen him at a night club many times.

3822 Q. Did you ever meet him?

A. I don't recall meeting him, but I spoke to him at the night club.

Q. Did you ever introduce anybody to Durante?

A. No Sir. During one of the visits to the office Col. Jacobson asked me where my nephew was stationed.

Q. Before you met Radovich?

A. Yes Sir. I told him they were clerks in Mitchell Field. He said "I can use clerks in my outfit." He said "I am going to have him transferred to my outfit."

Q. Is this the first time Jacobson knew the boys were at Mitchell Field?

A. I believe so. He suggested that he was going to take him into his outfit. He had him transferred to his outfit. A week or two later Lt. Roser brought up Captain Radovich and he says "He is in our company and he would like to order some uniforms too." I said "Swell."

Q. How long was this after Vidal had ordered uniforms?

A. Maybe three or four weeks. A short time.

Q. Had the uniforms that Vidal and Roser ordered been delivered to them at this point?

A. I don't think so. I am not sure. And I took him up and introduced him to the Busses. 3824

Q. Which one?

A. Either Phil or Harold.

Q. What did you say to them?

A. I told them the same thing. Another officer; a very good friend of mine. I met him through Lt. Roser. I want you to treat him the same say as you treated the others. He said "All right." From then on Radovich used to come up to the office very often. Almost every other day. He used to drive up and make himself very much at home. My brother has a desk up against the wall and has chairs in back of it. He would seat himself up in back of that. There was a little cabinet over in the corner and he would have a drink. I thought he was a very good friend of mine and I didn't mind it at all. He was very sociable, nice and congenial. This went on for sometime until one 3825 day he called my brother. He kept avoiding me, I noticed for a while and playing up to my brother. He was my friend. Hello Sam and Hello Eli. He called my brother and he told him he has to see him. My brother said "Come over."

Q. Can you fix the date of this?

A. No Sir.

Q. Approximately?

A. Honestly, I can't.

3826 *Government's Exhibit 19.*

Q. How long was it after you first met him?

A. Oh, this was, it might be two or three months. It was a couple of months I should think. He came in and he told my brother that something happened at the field; that he has to transfer the boys out to another camp up in Massachusetts. So my brother looked at him and he says "What happened?" He says "The outfit is being broken up." He asked him if he could keep him in the Field for a little while longer. He said he could not. So if he couldn't, that was the end of it and he left.

(Cont'd by EKL).

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3827

**Government's Exhibit 20.**

STATEMENT (Cont'd)

OF

ELIAS BAYER

Before:

EDWARD C. WALLACE
Assistant U. S. Attorney

Date: Feb 7, 1945

Appearances:

Same as in earlier portion of Statement.

3828

Stenographer: E. K. Levy
(Relieving ELC)

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*By Mr. Wallace.*

(Continuing)

A. I don't know whether he called or came up the next day and he said Sam, I think I've got an angle. He says

*Government's Exhibit 20.* 3829

I think I can get him into the Medies. So we were listening and he says to him, he says, I want to see you alone for a minute. So Solomon and I walked out; it was very peculiar to me, as I said before, there's a man that was supposed to be my friend, I introduced him to my brother, and he has got secrets from me. This and other things. I walked out with Solomon, out of the door. The door opens up against the wall and we stood against the other side and I heard him ask my brother for $500. He said he needed it because, I believe, his wife was going to California. My brother hesitated awhile and told him he didn't have the money but would try to get it. He started to walk out; as he did we walked in and my brother says 3830
to me I don't know whether this is a loan or a holdup. I looked at him. I couldn't answer him. I didn't know what to tell him because he asked me what do you think. Sam, I says, I don't know, it's your problem and you will have to make up your own mind as to what to do. I believe he came up again and my brother gave him $450.

Q. How do you know that?

A. My brother told me. He comes up again in a couple of days later and he says to my brother, everything is all right. Transfers are going through. He says they will be through in a short time and again asked to see my brother. We walked out again and my brother looked up and Solomon and I walked out and I heard him ask for $500. more. My brother asked him what he needed the 3831
money for and he says he needed it. And I heard my brother tell him that he didn't have it, that he would see if he can raise it, and he walked out again and we walked in.

A few days later, he comes up again, or maybe about a week, I don't know, and he tells my brother that the transfers are not coming through; something happened; and my brother asked him what happened but he said he

3832 *Government's Exhibit 20.*

didn't know but they are not coming through, something happened. I believe he sat down. He had a drink, and he says to my brother again, I want to see you Sam. Out we walked again, and I heard him say Sam, he says, if I get an additional $1,000. from you which I have to give to somebody on the Field, I can put those transfers through. There was silence there for awhile and my brother told him again he didn't have that money or that kind of money on him and he would see what he could do about it. Just then we walked into the office, and, as I said, he was sitting behind a desk there; he was dialing Mitchell Field, to get them on the telephone and spoke to a Lieutenant there.

3833 Q. What was his name?

A. I don't remember, Mr. Wallace.

Q. Have you ever heard of it before?

A. No, sir.

Q. Would you recognize it if you heard it again? A. Perhaps, I don't know. I heard him tell this Lieutenant to fill out two applications for my two nephews and have them sign it and he says you know that jacket you asked me for, that flying jacket, I will see that you get it and he said if you do that for me, and he said don't worry Sam, everything is all right, and he hung up; and he said everything is going through now.

Q. Can you fix the time for this conversation?

A. Let's see—August or September.

Q. 1943?

3834 A. Yes. This is a guess, Mr. Wallace, believe me, I am just guessing. I imagine it was around that time. Well, I understand that my brother met him and gave him some money.

Q. Who told you that?

A. My brother. I wasn't there. I didn't see it. I didn't see Radovich again for several months. That's the last time I saw him when he—well, no, I wouldn't say that; he

came up to the office one time and spoke to my brother in the office alone and I understand my brother gave him some money at that time.

Q. Who told you that?

A. My brother did, and I didn't see him again for several months until one day he came up to the office and by that time I knew, my brother told me what was going on. I heard him telling my brother, Sam, he says, I can't do anything. He says, Walter, why can't you keep your hands off the boys; let things take its course; what did I ever do to you. He was pleading with him. He says, Sam, honest, if I had the money, I'd do it myself. This money isn't going to me. $1500. goes to one man, $2000. 3836
goes to another man; all I got is $1500. of the $5,000. we are talking about. He says we have to act pretty quick, I am going down South and we are pulling out. And he walked out.

He walked down the stairs and I walked right after him and I got him at the bottom of the stairs, in front of the door—we were walking toward Sixth Avenue—I said Rad, I said, what in hell did I ever do to you, and what did Sam do to you to take it out on the kids. He says, it's too late, I can't help it, this money has to be turned over if you want me to get the boys out of my outfit, which was supposed to be a very dangerous mission, and unless you are out at Goldsboro at a certain day I wouldn't be able to do that for you. He gave me the ulti- 3837
matum that the money had to be there at a certain day. So my brother asked me to go to Goldsboro, which I did.

Q. Who did you go with?

A. Well, sir—(addressing a gentleman in the room) do I have to answer that, sir?

Mr. Keenan: Well, it's the same situation that existed with his brother. This witness, this Elias Bayer,

admits that there was $5,000. paid that he knew about and that he had to do and pay to Captain Radovitz, but the man who paid him the money was represented by other Counsel and I am not representing him, and I have suggested at this time that they tell their own part and let the other people take care of themselves. That's correct, isn't it?

Witness: Yes, sir.

Q. Now, fix the time of this conversation which you had with Radovich at the bottom of the stairs?

A. It was the latter part of November.

3839 Q. 1943?

A. Yes, sir.

Q. And when did you go to Goldsboro, how long after that conversation?

A. I think a day or two.

Q. And when did Sam Bayer give you the $5,000?

A. He didn't give it to me.

Q. Who gave it?

A. Nobody gave it to me. I didn't have the money.

Q. Who did Sam Bayer give the $5,000. to?

A. He gave it to the other party that went down with me.

Q. How many of you went down?

A. Two.

Q. What time did you leave New York?

3840 A. We left New York late in the afternoon, it must have been around 3 or 4 o'clock, something like that.

Q. From the Penn. Station?

A. Yes, sir.

Q. Did you travel by Pullman?

A. It was a sleeper; yes, sir.

Q. When did you arrive in Goldsboro?

A. Very early in the morning, it must have been about 4 o'clock in the morning or thereabouts.

Q. What did you do when you got to Goldsboro?

A. We waited for Radovich at the station.

Q. What happened?

A. He came up in a staff car and I pointed him out and he walked in back of the station, with this other party that gave him the money.

Q. Did you go along?

A. No, sir.

Q. You didn't see the money pass?

A. No, sir.

Q. Then, what did you do?

A. We—I was supposed to do some business down there, to see the Mills, but instead we rented a cab that drove us 3842
to Raleigh and when we got there we took a train to New York.

Q. How far is Goldsboro from Raleigh?

A. It couldn't be very far because it only took us about —it must have been an hour before we got there.

Q. How did you know you could catch a train at Raleigh?

A. We didn't know. There was a train very late coming in from the South somewheres and we happened to catch it.

Q. Did you take a Pullman too?

A. We couldn't get it but after we were on the train the Conductor found space for us.

Q. Did you give anything else to Radovich besides the $5,000.?

A. Did I give anything else to Radovich? 3843

Q. Did you or the man that was with you?

A. Not that I know of.

Q. You are sure of that?

A. Yes, sir.

Q. You didn't have anything in your pocket to give to Radovich?

A. No, sir; no, sir.

Q. You didn't bring anything else down to give to Radovich?

A. No, sir.

Q. If the other man had you would know about it?

A. No, sir.

Q. Neither you nor the other man brought anything besides the $5,000. to give to Radovich?

A. No, sir.

Q. Now, is that the end of the contact that you had with Radovich?

A. Yes, sir.

Q. You received letters, didn't you, or Solomon did, that were torn up?

A. Yes, sir.

Q. Now, the first time you met any of these officers you
3845 say was in the early part of 1943, when you met Col. Vidal and Lieut. Roser, at the Bar of the Copacabana?

A. Yes, sir.

Q. And who was with you?

A. I believe my friend Martin Goldstein, he shared the apartment with me.

Q. Anyone else?

A. No, sir.

Q. And how did you happen to speak to these two officers?

A. We were standing next to each other. The bar at the Copacabana was no bigger than from here to the wall, very small, and we got to talking; how it happened I don't know. There we were talking.

Q. Then did you find out they were at Mitchell Field?

A. Yes, we did.

3846 Q. You knew your nephews were at Mitchell Field?

A. I don't believe they were in the Army yet.

Q. And was your other nephew Robert Bayer in the Army at that time?

A. Yes, he was.

Q. Where was he at?

A. At Pennsylvania, Middletown.

Q. And you gave Vidal or Roser your card?

A. I didn't give them my card but they marked my 'phone number or address down. Perhaps, they did. I don't know. We became quite chummy; we had several drinks, and you know how it is, we were patting each other on the back.

Q. And a few weeks or months later they called you and they came down to the office and you took them up to I. Bus?

A. Yes, sir.

Q. And they didn't pay for these uniforms?

A. No, they didn't.

Q. That was contrary to the understanding you had with 3848
Vidal and Roser?

A. It was contrary to my understanding.

Q. Now, Plymouth Thread paid for those uniforms?

A. Yes, sir.

Q. Did you ask Vidal to pay for his uniform?

A. Well, directly asking I wouldn't say, no. It was definitely decided that they were to pay at wholesale price and I did pass a remark, I believe, once that these uniforms hadn't been paid for as yet.

Q. And what did Vidal say?

A. Nothing much, he changed the subject and I just rode along with them.

Q. Well, is there any reason why you shouldn't ask him to pay for the uniform? 3849

A. No, I don't.

Q. Did you ask Roser?

A. No, I didn't.

Q. And subsequently Jacobson and Radovich bought uniforms there.

A. I believe Radovich and Jacobson subsequently returned the uniforms, they didn't like the fit.

Q. Did you go up to I. Bus & Company when Radovich went to place his order?

A. I took him up originally.

Q. And to whom did you introduce him?

A. As I say, to either Phil or Harold.

Q. And did you go back with Radovich at some later day?

A. I might have.

Q. Did Radovich return his uniform?

A. I believe he did return his uniform.

Q. At the time he returned his uniform, the other Officers' uniforms had been delivered?

A. Some of them.

Q. And they hadn't been paid for?

A. No.

3851 Q. What did you do when Radovich returned his uniform?

A. He asked me if I couldn't take him up to a place that makes better uniforms. I said I'd take him up to my tailor. I don't know whether that would be wholesale or not. If you want to I said I could take you up there. I believe he came up there with another officer.

Q. You took him where?

A. Mervin Levine.

Q. Did you introduce him to anyone there?

A. Yes, sir.

Q. Who?

A. Mervin Levine. I just said that these two men wanted to order uniforms, to take care of them.

Q. You didn't tell Levine that you would pay for the uniforms?

3852 A. No, sir.

Q. Who paid for the uniforms?

A. They did.

Q. Who?

A. Radovich, whoever took it out. I wasn't there when he took it out.

Q. Plymouth Thread and Yarn didn't pay for it?

A. I am sure they didn't.

Q. You are sure you didn't pay for it?

A. No, sir.

Q. You are sure you never told anybody at Levine's that you would pay for it?

A. No, sir.

Q. What do you mean by "no, sir"?

A. I didn't tell anybody that I would pay for it.

Q. Now, can you fix the time approximately when you took Radovich to Levine's?

A. I honestly can't.

Q. Did you buy Radovich anything at all?

A. I didn't buy anything for Radovich.

Q. Did Plymouth Thread and Yarn pay for anything that Radovich purchased?

A. Yes, I understand they did. 3854

Q. What?

A. I understand he went up to a monogram place and he ordered something.

Q. Before one of the Buses took him there had they spoken to you or Sam Bayer?

A. They didn't speak to me, and I don't think they spoke to my brother.

Q. Did they take him there after he returned the uniform? A. No, sir.

Q. This is before?

A. Yes, sir.

Q. Are you sure of that? A. Quite sure.

Q. What else did you or Plymouth Thread pay for that Radovich purchased?

A. I believe everything he took at this monogram place 3855
the Plymouth paid for. That's all that I know of.

Q. Did you ever take Radovich out of an evening?

A. Not alone, I don't think. He was in my company many times.

Q. Where did you take him?

A. Oh, we went out; we went to eat. When I say he was in my company there was always Lieut. Roser, Vidal or Jacobson around.

3856 *Government's Exhibit 20.*

Q. Did you ever go with Roser to theatre?

A. No, sir, I didn't.

Q. Did you ever go to Madison Square Garden with Roser?

A. We might have.

Q. How many times?

A. Once or twice.

Q. Who went?

A. I think Vidal and Roser, I am not sure.

Q. Did you take Radovich?

A. I believe he was there once or twice.

Q. Did you take Jacobson?

3857 A. I think so. I know we went to see a fight. Who was there—I know Radovich was there once.

Q. Who paid for the tickets?

A. Well, I ordered the tickets but they took me out for dinner that evening.

Q. Where did they take you?

A. I believe we went to the Hickory House. When I say the Hickory House, Mr. Wallace, it's because that's a favorite eating place of mine; it was right near the place where I lived and most of the time we walked in there. It's most possibly—likely that that would be the place.

Q. Well, the evenings that you went to fights at Madison Square Garden, you went to dinner first?

A. Yes, sir.

Q. And you say you didn't pay for the dinner; who did?

3858 A. One of the Army men.

Q. Would you say Jacobson?

A. I don't know, one of them paid it and split it up but I didn't pay.

Q. Was there any civilian present, besides yourself?

A. I don't think so.

Q. Now, after the fights, where did you go?

A. We had a couple of drinks.

Q. Where?

A. At the Martinique.

Q. Who paid the bill there?

A. I didn't.

Q. You are sure of that?

A. Yes, sir.

Q. Did the Army officers pay for them?

A. Yes, sir; one of them did.

Q. Now, was there any other occasion you went to the fights besides *this one you were talking about*?

A. There might have been one more, I don't recall Mr. Wallace. They used to call me up from the Field and say there was a fight on tonight and ask if I could get the 3860
tickets, and once or twice I did it.

Q. Who called?

A. Either Vidal or Roser, that there was a fight on Friday night, could you get me some tickets, and I said I will try, and once or twice I think I got them.

Q. Who do you remember seeing fighting at the Garden?

A. I don't remember.

Q. Was this after they ordered their uniforms?

A. Oh, yes.

Q. Was it after they hadn't paid for their uniforms?

A. Well, it must have been.

Q. Now, after this Col. Hogan and Col. Snyder had spoken to you, you gave him a statement, didn't you?

A. I gave one to Mr. Snyder.

Q. And I think you denied buying uniforms. 3861

A. I denied everything.

Q. You didn't deny knowing them?

A. No, I didn't.

Q. Miss Solomon typed up that statement?

A. I believe I made a copy of it.

Q. And what did you do after the Army officers left in relation to I. Bus & Company?

A. What did I do?

3862 *Government's Exhibit 20.*

Q. Yes?

A. I didn't do anything.

Q. Did you call Harold Bus?

A. No, I didn't.

Q. Did you ask Harold Bus to change the records?

A. I did not.

Q. You are sure of that?

A. I am positive.

Q. And did you speak to anyone up at I. Bus & Company regarding the records?

A. No, sir.

Q. Did you know that the records were changed?

3863 A. I did not.

Q. This is the first time you ever heard of it?

A. When you say did I know, are you talking about when Snyder was up to my office?

Q. I am talking about—at any time that the records of I. Bus & Company had been altered?

A. I heard something about it, yes.

Q. When for the first time, did you know anything about the changing of the records?

A. I don't know just when—what I heard was very little about it. I wasn't interested. I had nothing to do with it. I didn't know anything about it.

Q. Was it after your arrest that you heard of the changing of the records?

A. Yes, sir.

3864 Q. Who told you?

A. I think I heard it through Miss Solomon or my brother, one of the two.

(Relieved by D. H. M.)

3865

**Government's Exhibit 21.**

STATEMENT

OF

ELIAS BAYER
(Contd from EKL)

Before:

EDWARD C. WALLACE
Assistant U. S. Attorney

Appearances:

(Same as in previous portion of statement).

3866

Date: February 7, 1945
Steno: Dorothy H. Miller

*By Mr. Wallace*

Q. Have you ever spoken to Colonel Jacobson on the telephone?

A. Yes, sir.

Q. On how many occasions?

A. Many times.

Q. Did you ever speak to him at one time that your brother Sam Bayer also spoke to him on the phone?

A. Might have been.

Q. Did you ever speak to Jacobson about the transfers of the boys?

3867

A. I spoke to him about that after I knew that Ratovich kept calling my brother and bothering him for money and I tried to get the boys away from his clutches where he could do them any harm or to try and harm my brother. I asked him if he could do anything.

Q. Was this in person that you asked him or on the telephone?

A. Over the telephone.

3868 *Government's Exhibit 21.*

Q. Was this before you paid the $5,000?
A. Yes, sir.
Q. Where was Jacobson at the time?
A. In Albany.
Q. You phoned him in Albany?
A. Yes, sir.
Q. How did you know that he was in Albany?
A. I am very friendly with his wife and kids and I knew he was transferred out there.
Q. From where did you know him?
A. From my office.
Q. Was Sam Bayer present when you telephoned?
3869 A. I do not think so because my brother Sam didn't know anything about it.
Q. Tell us just what your conversation with Jacobson was.
A. I asked him—I couldn't tell him I wanted the boys to be taken out. I was afraid, my brother was afraid—I knew my brother was in a jam and I couldn't go to him because I was afraid he would do—I was asking him if he could have my brother transferred out to Mitchell Field.
Q. Well, in what outfit were they?
A. They were stationed in Massachusetts.
Q. One was in Massachusetts and one was in Connecticut?
A. Well, afterwards both outfits were transferred to Massachusetts.
3870 Q. Was this before Ratovich had said he was going to have them shifted into his outfit?
A. Yes, sir. You talking about Goldsboro now?
Q. Yes.
A. Yes, sir.
Q. Now both boys were in Massachusetts?
A. Yes, sir.
Q. Were they in Ratovich's outfit at this time?
A. I don't know.

3871

Q. They were at Westover Field?

A. Yes, sir.

Q. And you called up Jacobson?

A. Yes, sir.

Q. What was the conversation as best you can recall?

A. I asked him if there was anything he could do to get the boys out from the outfits they were in and he said he couldn't.

Q. And that was the end of the conversation?

A. Yes, sir.

Q. And that was the only time you spoke to Jacobson about having the boys transferred?

A. That's about the only time I can remember.

3872

Q. And do you where Sam Bayer got the $5,000 that he gave to you to give Sam Ratovich?

A. I understand he got it from the family.

Q. When I referred to the $5,000 that Sam Bayer gave you I meant the $5,000 that was paid to Ratovich in Goldsboro and I do not intend to put words in your mouth that you said that Sam gave you the $5,000.

A. Yes, sir.

Q. Now, did you talk to any other officers besides Jacobson about having the boys transferred?

A. Yes, sir.

Q. To whom?

A. My business took me through the state of Pennsylvania where I traveled for many years selling sewing thread to the different factories and one of my customers 3873
who was in Columbia, Pennsylvania, is an old army man and he introduced me by letter to Colonel Clarke.

Q. Who is the old army man?

A. General Sharron. He is in the dress business.

Q. What did you say to General Sharron?

A. At the time I got this introduction Robert was on Mitchell Field—my brother's oldest son—and he told me that he heard there were openings in Pennsylvania—Mid-

dletown—in the finance section. He had the schooling for it in college and he would like to apply for a transfer to Middletown and when I saw General Sharron and told him that my boy would like to get transferred into Middletown he said, "I know the Colonel and I will give you a letter to him and maybe he can help you out."

Q. What is the name of the firm that the General is connected with?

A. The Lucas Manufacturing Company.

Q. And he gave you a letter to Colonel Clarke?

A. He gave me a letter to Colonel Lundberg but when I got there Colonel Clarke was there.

3875 Q. What did you say to Colonel Clarke?

A. I explained to him that my son took up finance in college and he would like to get into finance and would it be possible for him to get in if he applied. He told me that if he applied and they approved it he would get in.

Q. Was that the only occasion you spoke to Colonel Clarke?

A. Oh, no. I saw him every week. I would drive by the Field every week.

Q. Where would he stay when he was in New York?

A. At the Waldorf mostly.

Q. Did you ever pay any of his hotel bills?

A. No, sir.

Q. Did you ever give him any presents?

A. I gave him a Christmas gift. I gave his wife a gift.

3876 He gave me a gift—here it is.

Q. What gifts did he give you or your wife?

A. He gave me this and a wedding present; when my baby was born he sent me a gift.

Q. And what did you give him?

A. Nothing of any consequence. Christmas I might have sent him a gift—flowers—I really never gave him anything. He was very nice. I entertained him when he came to New York and he entertained me.

Q. What officers have you ever met who were stationed at Mitchell Field?

A. Lt. Col. Vidal, Col. Jacobson, Lt. Roser, Captain Ratovich. I met one, a Captain Engelhart, I believe it is.

Q. Anybody named Pepper?

A. No, sir.

Q. Did you ever meet any medical officers?

A. No, sir.

Q. Do you know any medical officers in the army?

A. No, sir.

Q. Stationed anywhere?

A. No, sir.

Q. What presents have you or Sam given to Jacobson?

A. Jacobson?

Q. Yes.

A. His kid might have gotten a couple little dresses from me. That's about all.

Q. Did you ever give him a set of tires?

A. No, sir. Not that I know of.

Q. Did you or Sam Bayer give him any liquor?

A. No, sir.

Q. What were you going to say?

A. I was going to say Col. Jacobson—he came up to the office several months ago and I wasn't in. He left a gift for my baby—a belated gift when she was born—a blanket.

Q. Did you ever speak to Vidal on the telephone?

A. Yes, sir. Many times.

Q. Did he call you or you call him?

A. He called me.

Q. What did he call you for?

A. Well, when he was coming to New York, and sometimes he would ask me to meet him at certain places. On different occasions—it wasn't planned—he used to call me up.

3880 *Government's Exhibit 21.*

Q. What did you call him about?

A. Just purely social.

Q. Did you ever speak to Vidal about getting the boys transferred?

A. No, sir.

Q. Did Sam Bayer ever speak to Vidal?

A. Not to my knowledge.

Q. Did Sam Bayer ever tell you he asked Vidal to keep the boys at Mitchell Field?

A. No, sir. I never heard about it.

Q. And you never asked Vidal about that?

A. No, sir.

3881 Q. What about theatre tickets? Did any of the boys get theatre tickets and charge them to Plymouth Thread?

A. Well, I don't know that. I know that Ratovich would do that often.

Q. Do what?

A. Go in and buy tickets and charge it to Plymouth Thread.

Q. Did you approve it?

A. No, I never approved it.

Q. Did Sam Bayer approve it?

A. I don't know.

Q. Do you know a Col. Dykemeyers?

A. I don't know him. I heard his name mentioned by Ratovich.

Q. What did he say about him?

3882 A. I think he brought in a coat of his one time to have insignias made for him.

Q. Do you know a Lt. John Gimbel, Jr.?

A. No, sir.

Q. Ever hear of him?

A. No, sir.

Q. Do you know Ed A. Martin?

A. No, sir.

Q. Ever hear of a Charles Deninberg?
A. No, sir.
Q. Do you know a Lt. Bentley in the navy?
A. No, sir.
Q. Know a Col. Lipkin?
A. Yes. I met him.
Q. Where?
A. At his home.
Q. Where is his home?
A. I believe it is in Garden City.
Q. How did you happen to meet him?
A. Col. Lundberg I think pointed to a——
Q. You told us that you get a letter from General Sharron to Col. Lundberg but that he was not at Middletown? 3884
A. This was after that.
Q. When did you meet Col. Lundberg?
A. Sometime about a month after I met Col. Clarke.
Q. Well, Col. Lundberg was stationed at Middletown?
A. Yes, sir.
Q. And have you seen Col. Lundberg in New York?
A. I met him once.
Q. Now, how did you meet Col. Lipkin?
A. I told Col. Lundberg that—he knew I have two nephews in the army and I told him that my nephew was in Bradley Field and he said the commanding officer up at Bradley Field is a good friend of his.
Q. Who said this?
A. Col. Lundberg. I said that's fine and I explained to 3885
him that my brother is a very sick man and I knew that Ratovich was bothering him and wanted to push him out
Q. Did you tell that to Lundberg?
A. No, sir. So he gave me a letter to Col. Jones at Bradley asking if he could do something for me.
Q. What did you want done?
A. I wanted him to take him away from——

3886 *Government's Exhibit 21.*

Q. Just what did you say to Col. Lundberg?

A. I told Col. Lundberg that my nephew was in the Airborne Engineers and that he wasn't feeling well. I would like to have him remain on the field a little bit longer and he said "I can give you a letter to Col. Jones and he might be able to do something." But he wasn't able to do anything.

Q. What did you say to Col. Jones?

A. I explained that my mother was very worried about the boy. If they could keep him on the Field a little longer it would be very good.

Q. What did Col. Jones say?

3887 A. He said he'd try and nothing was done.

Q. What about Col. Lipkin?

A. Col. Lipkin was a friend of his. They made a trip together. He said, "I know this Colonel."

Q. Was this after you were up to see Col. Jones?

A. Yes, sir.

Q. Now, where did you meet Col. Lipkin?

A. At his home.

Q. Where?

A. In Garden City. I believe it is.

Q. Who took you to his home?

A. I drove there myself.

Q. Did you have an appointment with him?

A. I called and made an appointment.

Q. Who was present?

3888 A. His wife came in a little later I believe.

Q. What was your conversation with Col. Lipkin?

A. I told him the same thing I told Col. Jones. I have a nephew who is the son of my brother and the fellow was sick and if he couldn't arrange to have him kept at the Field where he was.

Q. And what did Col. Lipkin do?

A. He said he would try, but he didn't do anything.

Q. And did you communicate with him after that?

A. I called him after and he said he wasn't able to do anything.

Q. And you only called him once after you spoke to him, to find out if he had done anything?

A. Yes, sir.

Q. How many times had you spoken to Col. Lundberg about the boy or boys?

A. That's the only time.

Q. Do you know Sergeant Gross?

A. No, I don't.

Q. Ever hear of him?

A. I think I heard of him spoken of once. In the same office. Never met him. 3890

Q. Did you ever meet Col. Johnson?

A. No, sir.

Q. Ever hear of him?

A. No, sir.

Q. Ever hear of someone named Purdem?

A. No, sir.

Q. Did you ever give any liquor to Ratovich?

A. No, I never gave him any liquor.

Q. Did you ever give him any bottles of liquor?

A. He used to come into the office and if he'd see a bottle that was half full or full he'd grab it.

Q. But as far as you knew you never gave him any?

A. No, sir.

Q. Did you ever give any bottles or cases of liquor to any officer? 3891

A. No, sir.

Q. Now, when you met Rafovich in Goldsboro where were your nephews stationed?

A. At Goldsboro.

Q. Did you communicate with them?

A. No, sir.

3892 *Government's Exhibit 21.*

Q. After the first money was paid by your brother to Ratovich—that's $450, you recall?—

A. Yes, sir.

Q. Did Ratovich ever call your office collect?

A. He might have called my brother. He never called me. I don't know.

Q. Did you purchase any insurance in 1943?

A. Did I purchase any insurance?

Q. Yes.

A. I might have. I might have.

Q. Well?

A. I tell you truthfully, I know I took out a policy
3893 through my sister but I don't know about 1943.

Q. Well, aside from insurance gotten through your sister?

A. Well, I have insurance on my automobile——

Q. I don't mean renewal insurance I mean new insurance?

A. I can't answer that. I don't know what you mean. What kind of insurance do you mean?

Q. Any kind of insurance.

A. I might have taken out health insurance—I think I took out—and hospitalization through my broker.

Q. Who is your broker?

A. Equitable Brokerage.

Q. Have you placed all of your insurance either through the Equitable Brokerage or your sister?

3894 A. I think so.

Q. Well, would you know if you hadn't?

A. I don't remember any other insurance.

Q. Do you know anybody named Feldman?

A. No, sir. Feldman?

Q. Yes.

A. Might be a lot of people named Feldman.

Q. Have you got a friend named Feldman?

A. A friend?

Q. Yes.

A. I don't think so.

Q. Have you got a friend named Greenfield?

A. Oh, now that you mention his name, I do know this Feldman. Yes, I know a friend named Greenfield.

Q. Have you got a friend named Feldman?

A. Well, he is a friend of my nephew, Gerry Usedale.

Q. Where does he live?

A. Lives out in Long Island.

Q. And who is Greenfield?

A. He is also a friend of my nephew.

Q. What is his first name?

A. There are two brothers. One is George and one is 3896
Lou, I believe.

Q. Did Vidal or Roser ever use any rooms taken by you?

A. Col. Vidal and Roser flew in from where they were stationed out in Colorado—I believe it was last winter—and Roser called me from the hotel—I believe it was some place on 45th Street—might have been the Piccadilly Hotel, I am not sure. He told me they were in town and I was very glad to hear from them. I said, "Can I see you?" He said, "Sure, come up." He told me that this room was only for the night and they can't get a room and I knew that my nephew, Gerry, had an apartment at the Park Central Hotel which they leased by the month and I knew they were leaving for Florida and they had a few days coming to them on the monthly basis and I asked Gerry 3897
if he would mind if a friend of mine would use the apartment and he said, "No, not at all." And then I took Roser up and Vidal.

(Continued by L. Y.)

3898

**Government's Exhibit 22.**

Continuation of

STATEMENT

OF

ELIAS BAYER

Before:

EDWARD C. WALLACE, Esq.
Asst. U. S. Attorney

Present:

3899 Same, without exception

February 7, 1945
Steno: L. B. Young

*By Mr. Wallace:*

Q. Did Rosa Vidal ever pay for the use of the apartment?

A. No; was all paid for by them on a monthly basis.

Q. How long did they stay there?

A. Must have stayed a day or two.

Q. Are you sure it wasn't more than a day?

A. I'm sure it wasn't more than a day or two, it was a week-end. I didn't see them after I took them up.

3900 Q. This was in the fall of 1944?

A. I know it was during the winter, I know they went to Florida, had their wives down there.

Q. The fall of 1943 or the early part of 1944?

A. Was during the winter months.

Q. 1943-44, or the present winter?

A. This present winter.

Q. At that time Radovich or Vidal had not paid for their uniforms; had they?

A. No.

Q. You knew they had not paid for their uniforms?

A. Yes.

Q. You knew Plymouth Thread had to pay for them because they didn't?

A. That's right.

Q. Have you ever had any contact with Trousseau Monogram Co.?

A. Radovich took me up there.

Q. When?

A. He had to call for some stuff that he had up there, some coats or something that he left; I went with him.

Q. Did you speak to anybody up there?

A. The owner, yes. 3902

Q. What's his name?

A. I don't remember.

Q. What was the conversation?

A. He just came up there to get his coats and Radovich was talking to him, looking at different things—I went back again to this Monogram, I think, with Radovich again both times.

Q. Did you speak to the owner on both occasions?

A. Yes.

Q. What was your conversation with him on the second occasion?

A. Just about his work, he has nice work, liked his work very much.

Q. Did you buy anything from Trousseau?

A. No. 3903

Q. Did you pay for what Radovich bought?

A. I didn't pay for anything.

Q. Did Plymouth Thread pay for it.

A. Yes.

Q. Did you tell the owner of Trousseau you would pay for it?

A. No.

3904 *Government's Exhibit 22.*

Q. Did you tell them Plymouth Thread would pay for anything?

A. I did not.

Q. Did you tell them to send the check for what Radovich purchased to you, or to the Plymouth Thread?

A. No, sir, I didn't.

Q. Are you sure of that?

A. I'm positive of that.

Q. Were you ever at Mitchell Field?

A. Yes, I was out.

Q. (Mr. Keenan) Were you out there frequently?

A. I used to go out to visit Jacobson and Vidal; they
3905 lived near there.

Q. (Mr. K.) Why did you not ask these different officers to pay for their uniforms they had taken?

A. I took these officers up with the understanding they were going to get it wholesale. We became very friendly, we went out; and, heck, if he wasn't man enough to offer to me to pay for it—he was morally responsible for it.

Mr. K. Q. Did you ever ask any individual at any time to do anything for your nephews in the Army by way of transfer, or otherwise, for any sums of money you were to pay such individual?

A. No, sir.

Q. (Mr. K.) Or for any other gifts, or presents of any kind?

A. No, sir.

3906 Q. (Mr. K.) Did you ever suggest to any of these officers you mentioned, or to your brother, that arrangements be made to pay some money, or give something of value, so that your nephews could be treated different than anyone else in the Army, transferred from one company to another?

A. No, sir, I didn't.

Q. (Mr. K.) Why—when you were asked about this by the army intelligence officers—did you tell them falsehoods?

A. Well, in the first place, I knew that my brother denied everything and I knew that my brother was in a jamb; was afraid and scared, and denied everything, like my brother did.

Mr. K.:

Q. What were you afraid of?

A. Afraid of scandal; afraid of what would happen; afraid it would get into the papers—there were a lot of things in my mind; just scared, and denied everything.

Q. (Mr. Wallace) How old are you? 3908

A. Either 44 or 45—when I say that, it's undecided.

Q. Where were you born?

A. Russia.

Q. When did you come to this country?

A. I came here around 1908, 1909, 1907, around that time.

Q. You are married?

A. Yes, sir.

Q. How long?

A. Will be 2 years in June.

Q. Is that your first marriage?

A. No, sir.

Q. How many children have you?

A. One child by my first wife; and one child by this wife. 3909

Q. The first marriage resulted in a divorce?

A. Yes, sir.

Q. When did that occur?

A. About 20 years ago.

Q. You registered for the draft in 1940?

A. Yes, sir.

Q. How were you classified in 1940?

A. I had a 2B classification, I think it was.

3910 *Government's Exhibit 22.*

Q. You were single at that time?
A. Yes.
Q. What's that; essential industry?
A. Yes, they classified me in 1-A. I was up to the board, I had government orders, was ready to give up my business in a certain time and go into the army. They gave me time to complete my orders, and then I was to go in the army. In the meantime the new law came into effect about the age, and I was automatically left out.
Q. You only asked for one deferment?
A. That's all.
Q. Where is your draft board?
3911 A. Broadway & 81st St. Local Board #26.
Q. You are a citizen?
A. No, sir.
Q. You are not?
A. No, sir.
Q. Did you register under the Alien Registration Act?
A. Yes, sir.
Q. (GJF) Did you ever apply for citizenship?
A. Yes.
Where?
A. Applied down the Court House on Apr. 4, 1941—Supreme Court New York City (producing card).

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3912 **Government's Exhibit 23.**

Original check.

3913

**Government's Exhibit 23-A.**

(Photostat of Exhibit 23)

FIRST NATIONAL BANK IN PALM BEACH

No. 49896

Palm Beach, Florida. Dec 6 1943

Pay to the order of Captain Jack Pepper.....$500.00
500 Dols 00 Cts

Cashier's Check

(*Stamped*)

Payment Stopped

3914

---

**Government's Exhibit 24.**

Dear Sir

I am writing to inquire as to the necessary steps that I should take to obtain $500.00 which I gave your bank for a cashiers check on Dec. 6, 1943

It was made out to a Capt Jack Pepper and the check no. is #49896—the reason for the claim is that the check was destroyed and never cashed.

Will you kindly inform me as to the procedure by the 1st of Sept

3915

Thank you

WALTER RADOVICH

Address

Major Walter Radovich
Ward 15
New Cantonement Hospital
Mitchel Field N. Y.

3916

## Government's Exhibit 25.

COPY STATEMENT OF MAJOR RADOVICH MADE TO FBI AGENTS:

March 15th, 1945
New York, N. Y.

I, MAJOR WALTER V. RADOVICH, Air Corps Serial number 0-416891 make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have identified themselves to me and whom I know to be Special Agents of the Federal Bureau of Investigation. I make this statement of my own volition. No
3917 threats of force, promise of favors or duress of any type has been offered to me to induce me to make this statement and I know that anything I say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so.

Sometime about April, 1943 I was introduced to Elias Bayer by a Lt. Roser. The introduction took place in the apartment of Elias Bayer which was located on Central Park So. At this time I was (end of p. 1) Hq. Squadron Commander of the First Fighter Command stationed at Mitchell Field. About a week later Col. Felix Vidal, Lt. Col. Alfred H. Jacobson, Lt. Ferdinand D. Roeser and I went to the I. Buss Uniform Co. where we were introduced by Elias Bayer. Major Englehardt was
3918 also with us at this time. Englehardt and I were fitted for uniforms. I recall that at the time we were unable to obtain a definite price on the uniforms. The other officers had apparently been there before inasmuch as their uniforms were already being tailored.

After leaving I. Buss Uniform Co. we went to the office of the Plymouth Thread & Yarn Co. where I was introduced to Sam Bayer and where we were treated to several drinks. I became very friendly with Sam Bayer and

*Government's Exhibit 25.*

saw him on numerous occassions (end of p. 2) after this. Sam Bayer took my wife and myself to dinner at the Waldorf Astoria Hotel. His wife Blanche Bayer and his secretary were with us at the time. Sam introduced me to the headwaiter and gave me permission to sign his name to the checks at the Waldorf Astoria whenever I wanted to go there. I never made use of this privilege. I recall that my wife wanted a piece of the silverware as a souvenier and that Sam Bayer called the waiter and ordered a full set which he gave to my wife.

Sam Bayer's son Martin Bayer and his nephew, Melvin Usdan were in my organization at Mitchel Field. They had been transferred to my organization at the request of Lt. Col. Jacobson before I had been introduced to Sam Bayer. Sam often spoke to me about the boys and on many occassions asked me (end of p. 3) to assign them to special jobs such as moving them to the "line" from the file room. I refused to do this and told him that I intended to leave them where they were.

Sometime during July, 1943 I received a phone call at Mitchel Field from Sam Bayer. He asked me to meet him at his office at 30 W. 21st St., N. Y. C. I did so. Sam asked me why his boys (Martin Bayer and Melvin Usdan) had to be transferred from Mitchel Field. I told Sam Bayer that the boys had to go because I had learned that they had been held at Mitchel Field because he, Sam Bayer had furnished entertainment and had given gifts and uniform's to different officers at the field. I told him that a Lt. Pepper knew the names of the officers who had received uniforms and where the uniforms were purchased. I told him that I would have nothing (end of p. 4) to do with any arrangement of this nature. Sam said "What's the difference, the boys don't ask for any special favors" I told Sam that the boys had to go and that I intended to ship them out. He asked me to wait for a week before doing anything and I agreed to do so.

3922 *Government's Exhibit 25.*

Prior to the above conversation with Sam Bayer I had refused to accept the uniform which had been made for me at the I. Buss Uniform Co. When I refused to accept the uniform because it did not fit properly. Phil Busch asked me what I was kicking about and told me that I was not going to have to pay for the uniform. About this time Sam Bayer sent Elias Bayer and myself to Rogers Peet at 5th Ave and 41st St and told Elias to buy me an officers cap. Elias bought me a summer peak cap. I believe the cap cost about twelve and one half (end of p. 5) dollars.

I recall telling Sam Bayer that I had refused to accept the uniform which had been made at the I. Buss Uniform
3923 Co. Sam Bayer told me that he did not blame me for refusing to take the uniform and said that he did not intend to pay I. Buss for the uniform as long as I had not taken it. He sent me down with Elias Bayer to the shop of Mervin Levine & Co. where I was fitted for two uniforms. My adjutant Lt. Irving Zarowsky was with us at the time and he also was fitted for a uniform. Elias Bayer told Mervin Levine, "These are two friends of mine; I want you to fix them up with uniforms and do a good job." Although I understood that a deposit was required to the best of my recollection no money was paid for the uniforms that day. I returned for several fittings as I had ordered both (end of p. 6) a winter and a summer uniform. A short time later I stopped in to see Sam
3924 Bayer at his office. He asked me if I was going to pick up my uniform and when I told him that I was he gave me the money to pay for both my uniform and that of Lt. Zarowsky. I don't remember the amount of money which Sam Bayer gave me that day but I do recall that he knew what the uniforms would cost and that he gave me the exact amount of money. I picked up the summer uniform and paid Mervin Levine the money which I had received from Sam Bayer. I never returned to pick up the winter uniform.

3925

About a week after I had told Sam Bayer that I intended to transfer the boys, I met him in his office. He told me that he had made arrangements with an adjutant at the Base Hospital, by the name of Fabbricatore and a "full chicken" colonel (end of p. 7) of the First Air Force to have the boys transferred to the medical corps at Mitchel Field. He told me that he had made this contact with the "full chicken" colonel through an insurance agent whom he either knew or had done business with. He said he had been obliged to purchase a $50,000 insurance policy in order to make the above contact. I asked Sam Bayer to tell me the name of the colonel but he said he would rather not do this. Sam Bayer then told me that he would 3926
give me $2,500 for each of the boys if I would approve the transfer of the boys to the Medical Corps. He told me that the transfers would mean a lot to him and that he made a lot of money and that money did not mean anything to him. I told Sam that I would approve the transfers but that I could not guarantee the results. I recall that at this meeting he spoke to me about my desire to go overseas (end of p. 8) and told me that he thought I was very foolish.

Shortly after the above meeting with Sam Bayer, the transfer requests of Pvt Martin Bayer and Pvt Melvin Usdan came across my desk and I approved them.

Thereafter Sam Bayer and I were in frequent contact with each other. At times he was very emotionally upset 3927
and would cry and kiss my hand and tell me that I did not realize what a good thing I was doing for him. He told me that he had worried so much about the boys being sent overseas that he had suffered a heart attack and had been forced to go to a sanitarium. Upon these occassions his secretary Anne Solomon would usually comfort him. Anne Solomon often expressed great concern as to whether the transfers would be approved and expressed fear that the

boys might be stuck. She told me that they were counting on me (end of p. 9) and that I was the only one who could help them.

About July, 1943 a short time after I had approved the transfers of the boys Sam Bayer gave me a roll of bills containing about $800.00. I recall that we were riding in a cab at the time. About four days later I met Sam Bayer in front of Radio City. We both sat in my car and he gave me another roll of bills containing about $700.00. He asked me if there was a chance of anything going wrong. I told him that the matter was out of my hands. About a day or so later I met Sam Bayer in the Hotel St. Moritz.
3929 He gave me another wad of bills amounting to about $450.00.

A short time later Sam Bayer called me up and told me that something had gone wrong, that the boys had been shipped to Westover and Bradley Field. I told him that I knew nothing about it and had nothing to do with those transfers. I (end of p. 10)offered to return the money to him but he refused.

About September, 1943 I met Sam Bayer and had breakfast with him on a Sunday morning. He asked me if there was any way I could have the boys transferred out of Westover and Bradley Fields or if I knew anyone who could arrange this. I told him I would look into the matter. When I returned to Mitchel Field I spoke to Capt.
3930 Jack Pepper and asked him what he could do to arrange a transfer for the boys. He told me he would look into the matter.

During this time I had been transferred to the First Air Commando Unit which was scheduled for immediate overseas duty. I decided to transfer the boys to my outfit and then to transfer them out as "overstrength" before our unit went overseas. I completed all the necessary arrangements and asked Capt. Pepper if he would keep an eye on

(end of p. 11) things to see that everything went according to schedule. I told him that I would give him $500.00.

About Oct. 1943 I called Sam Bayer from Washington D. C. and told him that everything was arranged. He agreed to have Elias Bayer meet me at Goldsboro, North Carolina about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers. The extra $1,000 was for "other people" whom I told Sam Bayer I had to work with. By "other people" I meant Pepper. Before I left New York I gave the name of Capt. Pepper to Anne Solomon in order that she could contact him if anything went wrong. 3932

On about the 27th or 28th of November, 1943 I met Elias Bayer and a man whom Elias introduced to me as the older brother of Pvt Melvin Usdan who had come along (end of p. 12) because Pvt Usdan's father was dead. This man asked me if I was sure that everything would be "OK" and appeared greatly concerned less the plan slip up. Elias Bayer gave me a white envelope containing $5,000. They also gave me three bottles of bourbon whiskey. The orders transferring the boys had already gone through.

I left Elias Bayer and the older brother of Pvt Usdan at the railroad station. Elias told me that they intended to catch a train for the south.

I recall that the last time I had seen Sam Bayer in New York, he had cautioned me against displaying the money and that he said "the F.B.I. is looking for things like this." 3933

About December 5th, 1943 while at Morrison Field, West Palm Beach, Fla. I purchased a cashier's check for $500.00 at the First National Bank to the order (end of p. 13) of Capt. Jack K. Pepper. I put this in an envelope and mailed it to Pepper at Mitchel Field. I did not enclose a note because I knew that all the mail was being censored.

3934 *Government's Exhibit 25.*

I have read the above statement consisting of thirteen pages and this page and it is true.

WALTER V. RADOVICH
March 17, 1945

WITNESSES:

E. J. McCabe & Gerald J. Flynn, Special Agents, F. B. I., N. Y. C. 3/17/45.

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**Government's Exhibit 26 for Identification.**

3935

Marked in evidence as Bayer Exhibit D.

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**Government's Exhibit 27.**

11 cards from files of Adjutant-General's Office, U. S. Army, indicating changes of station of Martin B. Bayer:

1. Dec. 22, 1942—First Base Hdqtrs & Air Base Sqdrn, Mitchel Field, N. Y.
2. Apr. 15, 1943—Transfer to Hdqtrs & Hdqtrs Sqdrn, Mitchel Field, N. Y.
3. Aug. 20, 1943—Transfer to Medical Detachment, Aviation, Mitchel Field, N. Y.

3936

4. Aug. 28, 1943—Transfer to Medical Detachment, Aviation, Airborne Engrs, Bradley Field.
5. Nov. 25, 1943—Transfer to 715 Training Group.
6. July 31, 1944—Transfer to 1060 Army Air Force Base, Greensboro, N. C.; shows change of status to corporal.

*Government's Exhibit 27.* 3937

7. Dec. 21, 1944—Transfer to CAS. AQ. 448 A.
8. Jan. 23, 1945—Transfer to Port of Debarkation.
9. Feb. 1, 1945—Transfer to 147 Replacement Co., Army Air Force.
10. Feb. 16, 1945—Transfer to 412 Air Service Sqdrn.
11. Feb. 20, 1945—Transfer to 305 Air Service Group.

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**Government's Exhibit 28.**

ENLISTMENT RECORD 3938

ARMY OF THE UNITED STATES

duration plus 6 mos.

BAYER, MARTIN BERNARD. Army serial number—12219010. Race—White

Home address—721 Reads Lane, Far Rockaway, New York

Enlisted at 480 Lexington Ave., N. Y. C., on the 15 day of December, 1942, in the grade of private by M. C. Tatum, 2nd Lt., Inf. for Air Force, Unasgd. to serve duration plus 6 mos. for service in Camp Upton, New York. Service completed for longevity pay 0 years 0 months.

Urban ☒ Mother tongue—English 3939

DECLARATION OF APPLICANT

1. When and where were you born? December 4th, 1923. New York, New York
   How old are you? 19 years 0 months.
2. Are you a citizen of the United States? yes
   What is your race? white

3940 *Government's Exhibit 28.*

3. What grade or year did you complete in: Grammar school—8. High school—4. College or university —0

4. What is your civilian trade or occupation? student.

6. Are you single, married, widower, or divorced? single. Is anyone dependent on you for support? no

7. Have you ever been convicted (a) of a felony? no. (b) of any offense? no
Have you ever been imprisoned under sentence of a civil court? no

3941 Have you ever been discharged other than honorably from the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

8. Have you ever served in the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

9. Have you ever previously applied for enlistment and been rejected? no

10. Do you know that if you are rejected because of any disqualifications known to you and concealed from the accepting officer, you will not be furnished with
3942 return transportation to the place of acceptance? yes

11. Have you ever: Used cocaine, heroin, morphine, marihuana, or any habit-forming drug or narcotic; since childhood wet the bed while asleep; had gonorrhea, sore on penis, convulsions or fits, or spells of unconsciousness; raised or spat up blood; had any illness, disease, or injury that required treatment at a hospital or asylum? no

*Government's Exhibit 28.* 3943

12. To the best of your knowledge and belief, are you now sound and well? yes

13. Do you know that if you secure your enlistment by means of any false statement, willful misrepresentation, or concealment as to your qualifications for enlistment, you are liable to trial by court martial for fraudulent enlistment? yes

I declare that I am not now a member of the Army (Regular Army Reserve excepted), Navy, Marine Corps, National Guard, or Coast Guard in an active, inactive, reserve, or retired status; that the foregoing questions and my answers thereto have been read to me; that my answers 3944
have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

Given at 480 Lexington Ave., N. Y. C., the place of acceptance, this 15 day of December, 1942

Signature of applicant:
MARTIN B. BAYER

Witness:
M. C. TATUM

Verified at ..... by M. C. Tatum, 2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.
Canvasser—door

3945

PHYSICAL EXAMINATION

1. Eye abnormalities—none
2. Ear, nose, throat abnormalities—none
3. Mouth and gum abnormalities—none

4. Teeth—

Right (Examinee's) Left

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| ~~8~~ | 7 | 6 | 5 | 4 | 3 | 2 | 1 | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | ~~8~~ |
| ~~16~~ | 15 | 14 | 13 | 12 | 11 | 10 | 9 | | 9 | 10 | 11 | 12 | 13 | 14 | 15 | ~~16~~ |

(Strike out those that are missing; circle those that may be restored)

5. Skin—normal

6. Varicose veins—none

7. Hernia—none

3947 8. Hemorrhoids—none

9. Genitalia—normal

10. Feet—normal

11. Musculo-skeletal defects—none

12. Abdominal viscera—normal

13. Cardiovascular system—normal

14. Lungs, including X-ray, if made—normal
x ray negative

15. Nervous system: reflexes, pupillary—normal, patellar —normal normal

16. Endocrine disturbances—none

3948 17. Results of laboratory examinations, when made— serology negative

18. Remarks on defects not sufficiently described above— scarlet fever at 7 years of age ND

19. Summary of defects in order of importance, impression of physical fitness—1 A

*Government's Exhibit 28.* 3949

Vision: Right eye—20/20. Left eye—20/20
Hearing: Right ear—20/20. Left ear—20/20
Height—67½ in.
Weight—152 lb.
Girth (at nipples): Inspiration—37 in. Expiration—35 in.
Girth (at umbilicus)—29 in.
Posture—good
Frame—medium
Color of hair—brown
Color of eyes—black
Complexion—brunette
Pulse: Sitting—96
Blood pressure: Systolic—146. Diastolic—60. 3950
Urinalysis: Sp. gr.—1.019. Albumin—negative. Sugar—negative

I certify that I have carefully examined the applicant and have correctly recorded the results of the examination; and that, to the best of my judgment and belief, he is mentally and physically qualified for service in the Army of the United States.

Place—480 Lexington Ave., N. Y. C.

Signature—LOUIS SCHNEIDER

Date—December 15, 1942

Name typed or stamped:

LOUIS SCHNEIDER, Capt. Medical Corps. 3951

3952 *Government's Exhibit 28.*

OATH AND CERTIFICATE OF ENLISTMENT

STATE OF NEW YORK
CITY, TOWN, OR MILITARY POST— } ss.:
480 LEXINGTON AVE., N. Y. C.

I, MARTIN BERNARD BAYER, a citizen of the United States, do hereby acknowledge to have voluntarily enlisted this 15 day of December, 1942, as a soldier in the Army of the United States of America for the period of duration plus 6 mos. under the conditions prescribed by law, unless sooner discharged by proper authority; and do also agree
3953 to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

Signature: MARTIN B. BAYER

I certify that the above oath was subscribed and duly sworn to before me this 15 day of December, A. D. 1942. I further certify that this soldier was minutely inspected by me previous to his subscription to the oath; that I found
3954 him entirely sober and in full possession of all [redacted]mental faculties; that to the best of my judgment and belief he fulfills all legal requirements; and that in enlisting him into the service of the United States I have strictly observed the regulations which govern the recruiting service.

I further certify that the above oath, as filled in, was read to the applicant before his subscription thereto.

M. C. TATUM
Recruiting Officer.
(Summary court)

M. C. Tatum,
2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.

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**Government's Exhibit 29.** 3956

ENLISTMENT RECORD

ARMY OF THE UNITED STATES

duration plus 6 mos.

USDAN, MELVIN. Army serial number—12219208. Race—white

Home address—1058 New McNeil Ave. Lawrence LI N.Y.

Enlisted at 480 Lexington Ave., N. Y. C., on the 15 day of Dec., 1942, in the grade of pvt. by M C Tatum 2nd Lt Inf for Air Force Unasgd to serve duration plus 6 mos. for service in Camp Upton N. Y. Service completed for longevity pay—0 years 0 months. Last enlisted service 3957
in the Regular Army, Regular Army Reserve, or National Guard: none. Urban ☒ Mother tongue—English

DECLARATION OF APPLICANT

1. When and where were you born? Nov. 27, 1923. N.Y.C. N.Y.
How old are you? 19 years 0 months.

3958 *Government's Exhibit 29.*

2. Are you a citizen of the United States? yes
What is your race? white

3. What grade or year did you complete in: Grammar school—8. High school—4. College or university —1

4. What is your civilian trade or occupation? machinist. How long did you work at it? 3 yrs. Weekly wage? $35

5. What special military qualification or occupation have you? none

3959 6. Are you single, married, widower, or divorced? single. Is anyone dependent on you for support? no

7. Have you ever been convicted (a) of a felony? no (b) of any offense? no
Have you ever been imprisoned under sentence of a civil court? no
Have you ever been discharged other than honorably from the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

8. Have you ever served in the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

3960 9. Have you ever previously applied for enlistment and been rejected? no

10. Do you know that if you are rejected because of any disqualifications known to you and concealed from the accepting officer, you will not be furnished with return transportation to the place of acceptance? yes

*Government's Exhibit 29.* 3961

11. Have you ever: Used cocaine, heroin, morphine, marihuana, or any habit-forming drug or narcotic; since childhood wet the bed while asleep; had gonorrhea, sore on penis, convulsions or fits, or spells of unconsciousness; raised or spat up blood; had any illness, disease, or injury that required treatment at a hospital or asylum? no

12. To the best of your knowledge and belief, are you now sound and well? yes

13. Do you know that if you secure your enlistment by means of any false statement, willful misrepresentation, or concealment as to your qualifications for 3962
enlistment, you are liable to trial by court martial for fraudulent enlistment? yes

I declare that I am not now a member of the Army (Regular Army Reserve excepted), Navy, Marine Corps, National Guard, or Coast Guard in an active, inactive, reserve, or retired status; that the foregoing questions and my answers thereto have been read to me; that my answers have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

Given at 480 Lexington Ave., N. Y. C., the place of acceptance, this 15 day of Dec., 1942

3963

Signature of applicant:
MELVIN USDAN

Witness:

M. C. TATUM

Verified at.....by M. C. Tatum, 2nd Lieut., Infantry, Asst. Recruiting & Induction Off.

Canvasser—door

3964 *Government's Exhibit 29.*

PHYSICAL EXAMINATION

1. Eye abnormalities—none
2. Ear, nose, throat abnormalities—none
3. Mouth and gum abnormalities—none
4. Teeth

Right (Examinee's) Left

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 7 | 6 | 5 | 4 | 3 | 2 | 1 | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 16 | 15 | 14 | 13 | 12 | 11 | 10 | 9 | | 9 | 10 | 11 | 12 | 13 | ~~14~~ | 15 | 16 |

(Strike out those that are missing; circle those that may be restored)

3965

5. Skin—normal
6. Varicose veins—none
7. Hernia—none
8. Hemorrhoids—none
9. Genitalia—normal
10. Feet—normal
11. Musculo-skeletal defects—none
12. Abdominal viscera—normal
13. Cardiovascular system—normal
14. Lungs, including X-ray, if made—normal

3966 x ray negative

15. Nervous system: reflexes, pupillary—normal, patellar normal normal
16. Endocrine disturbances—none
17. Results of laboratory examinations, when made—serology negative

* * * * * *

*Government's Exhibit 29.* 3967

19. Summary of defects in order of importance, impression of physical fitness—1 A

Vision: Right eye—20/20. Left eye—20/20.
Hearing: Right ear—20/20. Left ear—20/20.
Height—64½ in.
Weight—149 lb.
Girth (at nipples): Inspiration—37 in. Expiration—35 in.
Girth (at umbilicus)—32 in.
Posture—good
Frame—medium
Color of hair—black
Color of eyes—brown 3968
Complexion—fair
Pulse: Sitting—80.
Blood pressure: Systolic—130. Diastolic—70
Urinalysis: Sp. gr.—1.021. Albumin—negative. Sugar—negative

I certify that I have carefully examined the applicant and have correctly recorded the results of the examination; and that, to the best of my judgment and belief, he is mentally and physically qualified for service in the Army of the United States.

Place—480 Lexington Ave., N. Y. C.

Signature—LOUIS SCHNEIDER

Date—Dec. 15, 1942 3969

Name typed or stamped:

LOUIS SCHNEIDER, Capt. Medical Corps.

3970 *Government's Exhibit 29.*

OATH AND CERTIFICATE OF ENLISTMENT

STATE OF NEW YORK
CITY, TOWN, OR MILITARY POST— 480 LEXINGTON AVE., N. Y. C. } ss.:

I, MELVIN USDAN, a citizen of the United States, do hereby acknowledge to have voluntarily enlisted this 15 day of Dec., 1942, as a soldier in the Army of the United States of America for the period of duration plus 6 mos. under the conditions prescribed by law, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations,
3971 and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

Signature: MELVIN USDAN

I certify that the above oath was subscribed and duly sworn to before me this 15 day of Dec., A. D. 1942. I further certify that this soldier was minutely inspected by me previous to his subscription to the oath; that I found him entirely sober and in full possession of all his mental
3972 faculties; that to the best of my judgment and belief he fulfills all legal requirements, and that in enlisting him into the service of the United States I have strictly observed the regulations which govern the recruiting service. I further certify that the above oath, as filled in, was read to the applicant before his subscription thereto.

M. C. TATUM,
Recruiting Officer.
(Summary court)

M. C. Tatum,
2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.

3973

**Government's Exhibit 29-A.**

1058 New McNeil Avenue, Lawrence
L. I. N. Y.

December 3, 1942

I the undersigned, being the mother of Melvin Usdan a minor, an applicant for enlistment in the UNITED STATES ARMY, do hereby give my consent to his enlistment therein, for the DURATION AND A PERIOD OF 6 MOS. I further certify that I am not dependent upon him for support and that he is not married. I have no objection to his assignment or to his enlistment in the Regular Army Reserve upon his discharge from his enlistment in the Regular Army.

3974

The said Melvin Usdan was born on the 27th day of November, 1923, at New York in the State of New York.

I further certify that my husband the father of my son Melvin Usdan is deceased.

IDA USDAN
Signature of mother

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**Defendant Bayer's Exhibit A.**

HEADQUARTERS
552ND AAF BASE UNIT
(2ND FERRYING GROUP)

FERRYING DIVISION—AIR TRANSPORT COMMAND
NEW CASTLE ARMY AIR BASE
WILMINGTON 99, DELAWARE

3975

RCM/wb
12 April 1944

201.22—Bayer, Martin B. (Enl).

SUBJECT: Commendation

To : Enlisted Personnel of Order Writing, Personnel, Printing Publications & Distribution, Classification, Central Files, and Adjutant Sections

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3976 *Defendants Bayer's Exhibit A.*

1. To accomplish the recent reorganization of this Station confronted all concerned with a staggering amount of paper work. The task was an intricate one requiring a thorough understanding of alf its ramifications and tedious attention to the countless details attendant in a job of such size.

2. The successful manner in which this task was completed has elicited the highest praise from the Officers in charge of your respective Departments, to which I wish to add my own appreciation for your able performance. The arduous hours you worked willingly and ungrumblingly, your accurate recording of the many changes and, above
3977 all, the fact that this gigantic task was performed with very little interruption of your normal duties, reflects credit on your individual abilities and your devotion to duty as a soldier.

While the unspectacular tasks are often forgotten in the rush of business, such excellent accomplishment cannot go unnoticed. To all enlisted personnel who participated in this work, I extend my sincere commendation.

RONALD C. MCLAUGHLIN
Lt. Colonel, Air Corps
Commanding

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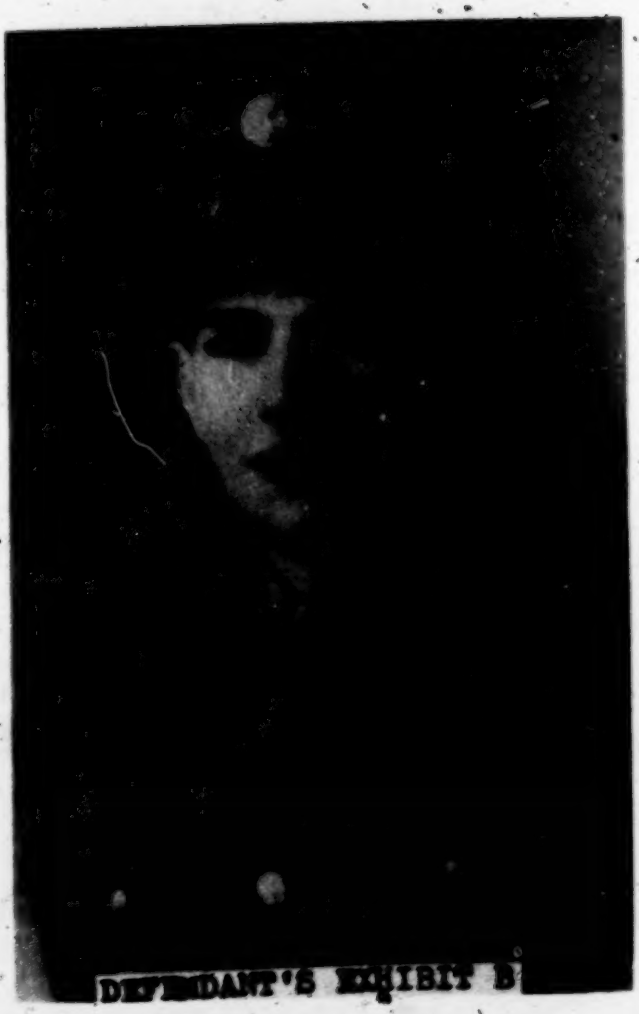
3978 **Defendant Bayer's Exhibit B.**

Photograph of Martin Bayer.

(Bound in Opposite.)


DEFENDANT'S EXHIBIT B

3982

**Defendant Bayer's Exhibit C.**

HOTEL WELLINGTON
Albany, N. Y.

June 26th 1943

Dear Eli:

I am so sorry that I missed your call yesterday. I should have got a big kick out of hearing your voice again. Here it is only a week and it seems as tho I was gone for a month. I sure do miss all of you.

This Command is a dandy. I am enjoying every minute
3983 of it so far. I am kept busy from early morning until late at night. Believe me the old slam bang has come back to me. My staff looks good, the officers and men appear to know their jobs & are capable.

I sure miss reaching out for the phone & talking to you at will. I hope you can find time to come up here and visit me. I have had a hell of a time finding a house the rents range averagely from $150.00 to $175.00 per month. I finally found a great place for the bargain(?) price of $115.00 per. It is right next door to some of our old friends here. Remember it has a bedroom in it for Uncle Eli.

How is Sam? I hope he isn't worrying himself too much. Please remember me to him & tell him that I send my most affectionate regards to himself & Mrs. Bayer.
3984 Also remember me to your niece & Miss Solomon & Mr. Weinburg. By the way I just received a note from Julius Weinburg from Denver, Colo.

Eli I want to thank you for all that you have done for me & mine & I hope that some day I can repay you in some small measure. I know I shall never be able to equal your generosity except in friendship alone.

The heat here has been almost unbearable as the temperature was accompanied by high moisture & humidity. But I hear you have been experiencing the same dose.

How goes the 'passion grand' or is it the 'pursuit of Eros'? Yes sir I am proud of the powers of my friend Eli "Barrymore" Bayer. Remember me to Anita & tell her I like her best of *all*, even tho her old man is a poor picker of horses.

Eli please take some time out & write to me, better yet come up & see me when you can.

So until the next letter my best to all the family & the gang.

With the warmest regards 3986

Your friend

AL.

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**Defendant Bayer's Exhibit C-1.**

Lt. Col. A. H. Jacobson A.C.
Hq. Albany Air Defense Region
P. O. Box 1833
Albany 1 N. Y.

(Postmark)
Albany N. Y.
Jun 26 1943
4 PM

Mr. Elias Bayer
30-32 West 21st St. 3987
New York City
N. Y.

3988

**Defendant Bayer's Exhibit D.**

Paragraph 32, S. O. 325, Hq. AAB, Westover Field, Mass., dated 22 November 1943. T/5 Melvin Usdan 12219208, and Pfc Martin Bayer 12219010, were transferred in grade to Project CA-281, Goldsboro, N. C., to report thereat not later than 25 November 1943 to the Commanding Officer, Overseas Replacement Depot #3, reporting to CO thereof for further overseas assignment, semi-tropical climate on permanent change of station. Authority AR 615-200, 15 March 1943, and TWX AFPMP 3888 from the CG, AAF, Washington, DC, dated 22 November 1943.

3989

20 July 1943

SUBJECT: Request for Transfer.

To : Commanding Officer, Headquarters Squadron, I Fighter Command, Mitchel Field, New York

1. It is requested that I, Pfc MARTIN BAYER, #12219010 be transferred from the Headquarters Squadron, I Fighter Command, Mitchel Field, New York to the Detachment, Medical Department, Army Air Base, Mitchel Field, New York.

3990

2. I was inducted into the service at Camp Upton, Long Island, N. Y. and received my basic training at the Army Air Base, Mitchel Field, N. Y. I have not received any army technical school training. I am a high school graduate and competent that I have the mental capacity to be a good medical department soldier.

*Defendants Bayer's Exhibit D.* 3991

3. Although I have no practical or specialized training in the Medical Department, it is my sincere belief that if said transfer is favorably considered, my services to the goverment would be of much greater value than at present.

4. No travel is inyolved.

MARTIN BAYER,
Private First Class
#12219010

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3992

REQUEST FOR TRANSFER (7-20-43)
220.3 1st Ind. WVR/dw

HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 22 July 1943.

To: CO, Station Hospital, Army Air Base, Mitchel Field, New York.

For remarks.

WALTER V. RADOVICH,
Capt., Air Corps,
Commanding.

3993

3994 *Defendants Bayer's Exhibit D.*

220.3 (20 Jul 43) 2nd Ind. AJF/mk/rn

STATION HOSPITAL, Mitchel Field, New York, 22 July 1943.

To: Commanding Officer, Hq & Hq Sqdn, I Fighter Command, Mitchel Field, N. Y.

1. Approved.

2. A vacancy exists in this organization.

FOR THE SURGEON:

3995 A. J. FABBRICATORE
1st Lieut., Med Adm C
ADJUTANT.

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REQUEST FOR TRANSFER (7-20-43)
220.3 Pfc MARTIN BAYER (501), 12219010 3rd Ind.
WVR/aw

Hq & Hq Sq, I FITR COMD, Mitchel Field, N. Y., July 23, 1943.

To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

3996 1. Approved.

2. Race: White.

3. Age at enlistment: 19 years.

4. Physical condition: Excellent.
service.

5. Date of enlistment: 15 December 1942—no prior

6. Soldier was not convicted by courts martial during current enlistment.

7. Soldier is not under charges, in confinement, or undergoing company punishment.

8. Statement of accounts: Due US: Nothing. Due soldier: accrued pay and allowances.

9. Military specification number: 501; civilian; student.

10. Single.

11. Character: Excellent.

12. Authorized strength of Squadron: 376. Actual strength: 317. 3998

13. Soldier attained a score of 11, 124 on the Army General Classification Test type 1c, taken 18 December 1942.

WALTER V. RADOVICH,
Capt., Air Corps,
Commanding.

3999

4000 *Defendants Bayer's Exhibit D.*

REQUEST FOR TRANSFER. (20 Jul 43)
220.33—Bayer, Martin (Enl) 4th Ind C/HTD/mcr

HQ I FIGHTER COMMAND, Mitchel Field, New York, 25 July 1943.

To: CG, AF, EDC and First Air Force, Mitchel Field, New York.

Approved.

For the Commanding General:

4001 R. B. TRAVIS
Major, A. G. D.,
Adjutant General.

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201—Bayer, Martin (Enl) 5th Ind. C/SAD/MO-25

HQ AIR FORCES E. D. C. AND FIRST AIR FORCE, Mitchel Field, N. Y.

To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

1. Not favorably considered in view of shortage of ad-
4002 ministrative technical clerks within your command.

2. It is desired that Private Bayer be reassigned where needed by unit under your jurisdiction.

By command of Major General ROYCE:

MARVIN OLIV,
1st Lt., AGD,
Asst Adj Gen.

*Defendants Bayer's Exhibit D.* 4003

REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (enl) 6th Ind. C:HTD:mer

HQ I FIGHTER COMMAND, Mitchel Field, New York,
3 August 1943.

To: CO, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

Attention invited to 5th Indorsement.
By command of Brigadier General BARCUS:

R. B. TRAVIS
Major, A. G. D., 4004
Adjutant General.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33 Bayer, Martin (enl) 7th Ind. WVR/cfk

HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 5 August 1943.

To: CO, Station Hospital, Army Air Base, Mitchel Field, N. Y.

1. Attention invited to 5th indorsement. 4005

2. Private Bayer has expressed his desire for a mutual transfer. Request remark.

WALTER V. RADOVICH,
Captain, Air Corps,
Commanding.

4006 *Defendants Bayer's Exhibit D.*

REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Epstein, Jerome L.) (Enl)
8th Ind. AJF/jfm

STATION HOSPITAL, Mitchel Field, New York, 7 August 1943.

To: Commanding Officer, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

1. Approved.
2. Race: White
3. Age at enlistment: 21 years
4. Physical condition: Good

4007

5. Date of enlistment: 27 January 1943—no prior service.
6. Soldier was not convicted by courts martial during current enlistment.
7. Soldier is not under charge, in confinement, or undergoing company punishment.
8. Statement of accounts: Due U. S.: Nothing. Due soldier: Accrued pay and allowances.
9. Military specification number: 501; Civilian: Supervisor
10. Single.

4008

11. Character: Excellent.
12. Authorized strength of Detachment: 335. Actual strength: 322.
13. Soldier attained a score of 111-97, on the Army General Classification Test type 1d, taken 3 February 1943.

FOR THE SURGEON:

A. J. FABBRICATORE,
1st Lieut., Med Adm C.,
EXECUTIVE OFFICER.

*Defendants Bayer's Exhibit D.* 4009

AB 220.33 (20 Jul 43) 9th Ind. VS/fg/rmm

HEADQUARTERS ARMY AIR BASE, Mitchel Field, L. I., N. Y., 7 August 1943.

To: Commanding Officer, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

Approved.

By order of Lt. Colonel SPARKS:

VERN SANDY,
1st Lt., A. C., 4010
Asst. Pers. Adj.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Enl) 10th Ind. WVR/cfk
HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 7 August 1943.
To: Commanding General, I Fighter Command, Mitchel Field, New York.

1. Attention invited to 8th and 9th indorsements.

2. Request reconsideration for transfer of Pvt. Bayer from this organization to the Detachment Medical Department, Army Air Base, Mitchel Field, New York. 4011

3. The named enlisted man has expressed a sincere desire to be transferred and it is believed would be of greater service to the government in the Medical Department.

4. Pvt. Bayer has been in this organization 5½ months. During that period has conducted himself as a good soldier without reservation. However, it is believed that Pvt. Bayer's capabilities are not being fully utilized in his pres-

ent capacity since his interests are directed toward medical administration. Transfer to the medical department would accomplish the above and obtain from Pvt. Bayer the maximum of work.

WALTER V. RADOVICH,
Captain, Air Corps,
Commanding.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Enl) 11th Ind. HTD/cfk
4013 HQ I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK,
8 August 1943.
To: CG, AF EDC and First Air Force, Mitchel Field, New York.

1. Approved.

2. Mutual transfer will not effect current shortages of administrative and technical clerks in this command.

For the Commanding General:

J. LEGAKIS,
1st Lt., Air Corps,
Actg. Asst. Adj. Gen.

4014

*Defendants Bayer's Exhibit D.* 4015

REQUEST FOR TRANSFER.

201—Bayer, Martin (Enl) 12th Ind. C/SAD/MO-25
HQ AIR FORCES E. D. C. AND FIRST AIR FORCE, Mitchel Field, N. Y.
To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

1. Issue necessary orders transferring Private Bayer to the Detachment Medical Department, Army Air Base, Mitchel Field, N. Y.

2. A replacement will be furnished in the usual manner.

By command of Major General ROYCE: 4016

MARVIN OLIV,
1st Lt., AGD,
Asst Adj Gen.

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**Defendant Bayer's Exhibit E.**

721 Reeds Lana Far Rockaway, NY
December 4, 1942

We I the undersigned, being the father and mother of Martin Bernard Bayer, a minor, an applicant for enlistment in the UNITED STATES ARMY, do hereby give our my consent to his enlistment therein. We I further certify that we are I am not dependent upon him for support and that he is not married. We I have no objection to his assignment, or to his enlistment in the Regular Army Reserve upon his discharge from his enlistment in the Regular Army. The said Martin Bernard Bayer was born on the ..... day of December 1923, at New York, in the State of NY 4017

SAMUEL BAYER
Signature of father

BLANCHE BAYER
Signature of mother

4018

**Defendant Bayer's Exhibit F.**

ELR—reb—5D527—73563.

WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON 25, D. C.

AGAP

10 April 1944.

MEMORANDUM FOR: Enlisted Branch, AGO.
Room 3018, Munitions.

Subject: Orders.

4019

1. Provided no military objections, request that orders be issued transferring Private First Class Melvin Usdan, 12219208, 881st Airborne Engineers, Medical Detachment, Westover Field, Massachusetts, in grade, to the Postal Battalion, Army Post Office, New York Port of Embarkation, Hotel Breslin, 29th and Broadway, New York, New York.

2. Request the Army Postal Service, Room 5D527, The Pentagon, be notified of action taken.

For the Director, Army Postal Service:

EARL L. RHODES
Earl L. Rhodes,
Lt Col, AGD;
Pers & Tng Br, APS.

4020

(Seal)

4021

**Defendant Bayer's Exhibit G.**

201
Usdan, Melvin
12219208
ERS
Index Number

INDEX SHEET

AG 220.31
TAG

12-18-42
2nd Serv. Comd.

Re orders assigning F. Geiger, M. Usdan, M. B. Bayer and others to stations indicated, provided they possess the necessary qualifications. 4022

hbe 1-21-43

(Seal)

4023

4024

**Stipulation as to Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK:

UNITED STATES OF AMERICA,
Appellee,
against
SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
Defendants-Appellants.

4025

IT IS HEREBY STIPULATED AND AGREED that the foregoing is the Bill of Exceptions herein as agreed on by the parties, and that the said Bill of Exceptions, together with the exhibits, constitutes all of the evidence in the case, and that the same may be settled and ordered on file as the Bill of Exceptions herein.

Dated: April 15, 1946.

JOHN F. X. McGOHEY,
United States Attorney for the
Southern District of New York,

By EDWARD C. WALLACE,
Assistant United States Attorney.

4026

ARCHIBALD PALMER,
Attorney for Defendant-Appellant
Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant-Appellant
Elias Bayer.

SAMUEL T. ANSELL and
ROGER ROBB,
Attorneys for Defendant-Appellant
Walter V. Radovich.

4027

**Order Settling Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Appellee,

against

SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
Defendants-Appellants.

4028

Upon the annexed stipulation, the within Bill of Exceptions is hereby settled and allowed, and ordered to be filed with the Clerk of this Court, and made a part of the transcript of record herein.

Dated: April 15, 1946.

*United States District Judge.*

4029

4030

**Judgment and Commitment of Defendant Samuel Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>SAMUEL BAYER, alias SAMUEL BOYARSKY. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States
4031 Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of TWO YEARS and FINED $10,000.

Defendant not ordered to stand committed for non-payment of fine.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945 at 10:30 A.M. Bail Continued.

IT IS FURTHER ORDERED that the Clerk deliver a certified
4032 copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

ALFRED D. BARKSDALE,
*United States District Judge.*

A TRUE COPY. Certified this 24th day of October 1945.

WILLIAM V. CONNELL,
Clerk.

(Seal)

*Judgment and Commitment of Defendant Samuel Bayer.* 4033

RETURN

I have executed the within judgment and commitment in the manner following: On Nov. 5 1945 I delivered said Samuel Bayer to the Warden of Detention Headquarters Temporarily pending transfer to the institution herein designated for the service of sentence; and on Nov. 15 1945, I delivered said Samuel Bayer to the Warden at Fed. Corr. Inst., Danbury, Conn. the institution designated, together with certified copy of the within Judgment and Commitment.

JAMES E. MULCAHY,
U. S. Marshal. 4034

by JOHN F. PICKETT,
Deputy.

Notice of appeal filed Oct. 29, 1945.
Elected to start service of sentence Nov. 10, 1945.

4035

4036

**Judgment and Commitment of Defendant Elias Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>ELIAS BAYER, alias ELIAS BOYARSKI. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States
4037 Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of EIGHTEEN MONTHS and FINED $5000.

Defendant not ordered to stand committed for non-payment of fine.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945 at 10:30 A.M. Bail Continued.

IT IS FURTHER ORDERED that the Clerk deliver a certified
4038 copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

ALFRED D BARKSDALE,
*United States District Judge.*

A TRUE COPY. Certified this 24th day of October 1945.

WILLIAM V. CONNELL,
Clerk.

(Seal)

*Judgment and Commitment of Defendant Elias Bayer.* 4039

RETURN

I have executed the within judgment and commitment in the manner following: On Nov. 5 1945 I delivered said Elias Bayer to the Warden of Detention Headquarters Temporarily pending transfer to the institution herein designated for the service of sentence; and on Nov. 19 1945, I delivered said Elias Bayer to the Warden at Fed. Corr. Inst., Danbury, Conn. the institution designated, together with certified copy of the within Judgment and Commitment.

JAMES E. MULCAHY,
U. S. Marshal. 4040

by JOSEPH C. DONOVAN,
Deputy.

Notice of appeal filed Oct. 29, 1945.
Elected to start service of sentence Nov. 10, 1945.

4041

4042

**Judgment and Commitment of Defendant Walter V. Radovich.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>WALTER V. RADOVICH. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

4043

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of ONE YEAR AND ONE DAY.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945, 10:30 A. M. Bail Continued.

4044

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

A. D. BARKSDALE,
*United States District Judge.*

3045

**Notice of Appeal of Defendants Samuel Bayer and Elias Bayer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA, Appellee, v. SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH, Defendants-Appellants. | C-120-468 |

4046

Names and addresses of appellants: Samuel Bayer, 657 Doughty Boulevard, Lawrence, Long Island, New York; Elias Bayer, 333 West 86th Street, New York, New York.

Name and address of appellant's attorney: Samuel Conrad Cohen, 32 Broadway, New York, New York.

Offense: Conspir cy to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army (18 U. S. C. A., 88).

Date of judgment: October 24, 1945.

Brief description of judgment and sentence: Samuel Bayer—imprisonment for two years; fine, $10,000. Elias Bayer—imprisonment for 18 months; fine, $5,000.

4047

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned on the grounds set forth below:

Dated: October 29, 1945.

SAMUEL BAYER
Appellant

ELIAS BAYER
Appellant

4048 *Notice of Appeal of Defendants Bayer.*

GROUNDS OF APPEAL

1. The statute under which appellants were indicted and convicted is unconstitutional in that it fails to set up any ascertainable standard of guilt.

2. The Court erred in denying appellants' motions to dismiss the indictment at the close of the Government's proof, on the ground that the Government failed to adduce proof sufficient to establish the commission of any crime by appellants.

4049 3. The Court erred in denying appellants' motions at the close of the Government's case to dismiss the indictment, on the ground that the Government failed to adduce proof sufficient to establish the *commission of any crime* beyond a reasonable doubt.

4. The Court erred in denying appellants' motions for directed verdicts of "Not Guilty", on the ground that there was no evidence in the case upon which a jury could find that appellants had committed any crime.

5. The Court erred in overruling appellants' motion made after the verdict, to set aside the verdict of "Guilty" on the ground that the verdict was contrary to the evidence and against the weight of the evidence.

4050 6. The verdict of "Guilty" against the appellants is contrary to law.

7. Appellants did not have a fair trial in that the United States Attorney in his summation was permitted by the Court to make inflammatory appeals to the passions of the jury to the prejudice of appellants.

8. The Court erred in denying appellants' motion to reopen the proofs before the verdict was rendered, to introduce material, competent and relevant evidence then acquired tending to establish the innocence of appellants of the crime charged.

9. The Court erred in denying appellants' motion to withdraw a juror on the ground that a material misstatement of fact was made to the jury by the United States Attorney concerning a fact, the proof of the contradiction of which was, during the course of the trial, in the possession of the United States Attorney.

4052

10. The Court erred in its rulings on the receipt of evidence at the trial.

11. In instructing the jury, in response to a question asked by it, the Court gave the jury the impression that it would consider its recommendation for clemency, whereas the Court did not intend to take into consideration such recommendation.

SAMUEL BAYER,
Appellant.

ELIAS BAYER,
Appellant.

SAMUEL CONRAD COHEN 4053
By: SAMUEL CONRAD COHEN,
Attorney for Appellants.

Received a copy of the foregoing Notice of Appeal and grounds for appeal this day of October, 1945.

United States Attorney.

4054

**Notice of Appeal of Defendant Walter V. Radovich.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>v.<br>ELIAS BAYER, SAMUEL BAYER and WALTER V. RADOVICH,<br>Defendants. | Criminal No. 120-468 |

4055 *Name and Address of Appellant:*

Walter V. Radovich, Mitchell Field, Long Island, New York.

*Name and Address of Attorneys for Appellant:*

Samuel T. Ansell and Roger Robb, Tower Building, Washington 5, D. C.

*Offense:*

Violation Section 88, Title 18, United States Code (Conspiracy to defraud the United States).

*Date of Judgment:*

4056 October 24, 1945.

*Description of Judgment or Sentence:*

The indictment was in one count, charging a violation of Section 88, Title 18, United States Code. Upon a verdict of guilty as indicted the appellant was sentenced to confinement in a penitentiary for a term of one year and one day.

*Name of Prison where now confined, if not on bail:*

The appellant, a Major in the Army of the United States, is presently under orders from his superiors directing him to report to the United States Attorney, Southern District of New York, for temporary duty, and upon completion of such duty, to proceed to proper station. The appellant has been ordered by the Court to surrender himself to the United States Marshal, Southern District of New York, for commitment, at 10:30 o'clock a. m., October 31, 1945.

I, the undersigned appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment of conviction hereinabove set forth on 4058 the grounds set forth below.

s/ WALTER V. RADOVICH
Appellant

October 29, 1945.

GROUNDS OF APPEAL

1. The Court erred in sustaining the demurrer interposed by the Government to the appellant's Plea in Bar to the indictment.

2. The Court erred in overruling the appellant's Demurrer to the indictment. 4059

3. The Court erred in permitting the jury to consider against the appellant acts and declarations of his alleged co-conspirators, which acts and declarations were done or made out of the presence of the appellant and prior to the existence of any conspiracy, and which never came to the knowledge of the appellant.

4060 *Notice of Appeal of Defendant Radovich.*

4. The Court erred in admitting in evidence against the appellant a written confession made by the appellant to Government investigators.

5. The Court erred in instructing the jury that the Court had ruled as a matter of law that the confession made by the appellant to Government investigators was voluntary, and that the jury might consider the circumstances surrounding the making of such confession only for the purpose of determining whether or not the confession was true;

4061 6. The Court erred in refusing to instruct the jury that if the confession of the appellant was induced or coerced in any degree by the circumstances of the appellant's confinement, then the jury must reject the confession entirely.

7. The Court erred in refusing to instruct the jury that the burden was upon the Government to prove beyond reasonable doubt that the confession of the appellant was voluntary.

8. The Court erred by reading and giving consideration to certain written statements made by the appellant to Government investigators, which statements were not identified by any witness or offered in evidence or shown to counsel for the appellant, but were furnished to the Court
4062 by the United States Attorney and read and considered by the Court in private.

9. The Court erred in refusing to instruct the jury that they must consider the presumption that the defendant was innocent as evidence in his favor.

10. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 3.

11. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 4.

12. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 5.

13. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 9.

14. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 10.

15. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 11. 4064

16. The Court erred in attempting to summarize for the jury the charge of the indictment, in that the Court's attempted summary of the charge was inaccurate and misleading.

17. The Court erred in instructing the jury that counsel for the co-defendants Bayer claimed that the co-defendants had paid money to the appellant as a result of extortion by the appellant, while the Government claimed that such money was paid as a bribe; the Court failing and refusing to advise the jury that the appellant did not admit nor concede that any money whatever had been paid to him, and that the burden was upon the Government to prove such payment. 4065

18. The Court's charge in respect of the evidence required to prove the existence of a conspiracy was argumentative.

19. The Court erred in charging the jury that the guilt or innocence of persons other than those on trial was no

4066 *Notice of Appeal of Defendant Radovich.*

concern of the jury, except as it might bear upon the credibility of certain witnesses who had testified.

20. The Court erred by entering into a colloquy with the jury in which the Court underfook to point out to the jury the witnesses who had given testimony relating to or supporting certain statements made by the United States Attorney in his argument to the jury.

Service of copy of the foregoing Notice of Appeal acknowledged this day of October, 1945.

4067

.....

United States Attorney
Southern District of New York

4068

4069

**Assignment of Errors by Defendants Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>against<br><br>SAMUEL BAYER, alias Samuel Bayersky, ELIAS BAYER, alias Elias Bayersky, and WALTER V. RADOVICH,<br><br>Defendants. | Criminal No. 120-468 |

4070

NOW COME SAMUEL BAYER and ELIAS BAYER, defendants herein, and file the following Assignment of Errors and respectfully show that error has intervened to their prejudice, to wit:

1. The Court erred in denying the motion to dismiss the indictment upon the ground of insufficiency at the opening of the case, to which denial the defendants Bayer duly and legally excepted (R. p. 89, fol. 266).

2. The Court erred in overruling the motion of the defendants Bayer at the close of the Government's case for a dismissal of the indictment and a directed verdict of acquittal of the defendants Bayer, to which ruling the said defendants duly and legally excepted (R. p. 717, fol. 2151) as follows:

4071

"Mr. Keenan: Your Honor, in asking the Court to grant a motion for the jury to be instructed to return a verdict for the defendants Samuel and Elias Bayer, I wish to specifically point out to the Court our objection, which we think is seasonably made at some time

during the prosecution's case, that we think that particularly important to make at the close, and that is: that the indictment does not charge an offense against the United States, and specifically that this purports to be a charge of conspiracy in violation of Title 18, Section 88, and that part of Section 88 which we may refer to I believe intelligently as two-pronged, the second portion of it, the first part of it being conspiracy to commit an offense against the United States and the second part conspiracy to defraud the United States in any manner or for any purpose.

We point out briefly but with great respect to your
4073 Honor, that we believe this is a novel theory in prosecution where Section 88 of Title 18 is adverted to, where reliance for the subject matter of the crime is the bare use of the word 'defraud' without reference to any other section of the United States Code. For example, in all other prosecutions that we know of, where we have been able to examine the authorities, the indictment specifies in one form or another that even if Section 88 is adverted to and even if there is a departure from the usual course of specifying the section of the Code of the offenses against the United States by section number, such as, for example, in some of the preceding indictments, Section 91, that even when reliance is made upon defrauding the United
4074 States there is of necessity reference to some statute of the United States which describes what is meant by 'fraud'.

And we say to your Honor that we believe upon reflection it will become very clear that if this indictment be sustained in this manner and fashion as alleged in this case, it just means that anything which would come within the definition of the word 'defraud', whatever it might be, and two people agreed or confederated

to perform, to do that thing, whatever it would be, and a single act were taken in pursuance thereof, we would have as claimed by the Government in this case, as they must claim, a violation of Section 88 of the second what I might call prongs for want of a better expression.

Now, your Honor, reflection on that will show that here is a felony with a very substantial criminal sanction attached thereto, where citizens of the United States could go about with so many opportunities and occasions to run afoul of the law, that we would get to the most absurd, to say nothing of cruel, situations imaginable, resting entirely upon the good sense of the 4076
administrative or executive branches, in the first instance, of the Government. For example, under the statute, in an indictment it is alleged that merely speaking to the elevator girl on the way up purposely to get her to slow up an elevator to keep a lawyer from arriving on time before your Honor in this case, and coupled with a stick of chewing gum, would amount to a conspiracy to defraud the United States, punishable with a long term in the penitentiary.

The point I am making is this, your Honor, that to sustain the indictment in this form would be to establish a pattern and type of crime where there would be no fabric, no clear-cut pattern that any citizen could ever know or anyone else ever know when 4077
he was within or without the law. And with great respect we submit to your Honor that the Congress of the United States never intended to create a mass, a class of crimes where the only limitation would be the limit to the fantastic, if he saw fit, notions of the prosecutor with the acquiescence of the grand jury.

So that, succinctly stated, or as clearly as we can, we think that there is a failure to state an offense

without the entire conspiracy relating to some better defined offense or area of offense than the particular term 'defraud', especially when the statement is made in the statute 'Defraud the United States in any manner or for any purpose.' We do not believe, your Honor, that it ever was contemplated or could have been in good sense by the Congress of the United States that the broad field of conspiracy, uniting with the broad field of fraud, with no definition of 'fraud' excepting that found presumably in Webster's Dictionary or the Century Dictionary or that had come into usage through practice—that is the only way
4079 where a man can find now whether he is running afoul of the criminal statutes—we do not believe that it was ever intended that that field of crime should be established in the United States.

And so on that ground, with great respect, we ask your Honor to consider whether to direct a verdict on the ground that the statute is so vague and so uncertain, that the indictment is so vague and so uncertain that it contravenes the requirements in that respect.

Now, secondly, we ask your Honor to consider our objection that there has been a failure dehors or aliunde, and let us call it independently of the so-called admissions—or admissions—to establish that which the law requires by way of data on the corpus
4080 delicti, which in this instance we claim, your Honor, is the conspiracy itself.

I think in a previous argument to your Honor I erroneously stated my position, and in a re-examination of the Forte case and allied cases, it became very clear that if whatever quantum of proof is necessary for the Government to meet to establish the corpus delicti, that the corpus delicti is more than the agreement; it would be enough, your Honor, we claim in

this case to require a directed verdict for the defendants Bayer if the corpus delicti were synonymous with the agreement. But very specially, in cases of conspiracy, we contend that that is the one crime where there is an exception to the rule, and the corpus delicti in a charge of conspiracy is the conspiracy itself, and of course every part of it.

Therefore, we do not know, with great respect, whether your Honor is following the Forte case or whether your Honor is following the Kertess case, if there be a difference in the two. And, very candidly, the Kertess case is in the Second Circuit. I know that it is familiar to counsel for the Government because 4082
the distinguished Assistant United States Attorney Mr. Wallace was counsel in that case, if my memory serves me correctly, or of counsel.

And there, your Honor, we seek at this time, if there is any way we can do it on such highly important matters as those touching admissions or confessions, and I think it can be conceded that we are on fundamental ground for the reservation of the rights of the defendants in Anglo Saxon courts, in contradistinction to those of foreign nations in that regard—it is well settled in our court that we do have certain safeguards that are foreign to the ideas of people that live in other groups, other parts of the world; but here we have some rules that are laid down; we have the requirements with reference to the corpus delicti—— 4083

The Court: You express a doubt as to which case I was following. I am in equal doubt and I would be grateful if you would elucidate a little on the two cases and the distinction, differentiation between the two.

Mr. Keenan: I think your Honor has posed a pretty good question to me, but let me state first what I be-

lieve the Forte case, written by the distinguished Justice Stevens, who happened to be an associate of mine in the Department, also a classmate in law school, so I am quite familiar with his views and those expressed—the Forte case is plain and clear authority for this. First, that if a confession or admission—confession or admission—is to be considered there must be some evidence aliunde of the corpus delicti. Now the Forte case follows the Eighth Circuit—there are two chief cases there, they are grouped together—and the Forte case claims that it states the overwhelming weight of authority in this country on that subject. It holds that the corpus delicti is not alone the 4085 agreement, but is the conspiracy, with the anomaly that I have mentioned before. And it holds, therefore, that before a confession can be considered adequate, the fact determining body must find in outside evidence substantial evidence of the conspiracy. And 'substantial evidence' the Forte case says, is the conspiracy or the corpus delicti, which it identifies, one or the other, and every part of it. That is the language of the Forte case. There is no blinking. The Forte case is as clear as a bell.

So that under the Forte case, and it doesn't make much difference, your Honor, in my opinion, whether there would be an independent ascertainment of the aliunde quantum before it was sent to the jury or not; 4086 it would still be the duty, with great respect to the court, to make its finding to be the determination of the Government's case. That must be there. And the Court itself, not being desirous to evade the duty, never could, anyway because it had a plain function it has to perform.

Now it gets down to this, that before the Bayers can be found guilty by the use of these statements

that they made, if they be guilty admissions or confessions, and I am not going to differentiate for the moment between the two, whatever they are, whatever they may be—that there must be proof offered of every single part of this conspiracy. And, your Honor, it must be the conspiracy that is alleged in this indictment. It can't be any other conspiracy and it must be the whole of it. They can't divide it into two parts or it can't be the more particulative; it must be that this was the whole thing because that is what the authority says—the corpus delicti is the whole entire conspiracy and it should be from—from September 1, 1942 until July 15, 1945; and the Forte case says that 4088
outside any admissions or confessions there must be evidence supporting every single essential element of that entire conspiracy, every part of it as alleged in the indictment.

The Court: Do you construe that 'every part' means that the Government has to prove everything complained of in the indictment, the dates and everything else?

Mr. Keenan: Exactly, your Honor. That is the burden the Government undertook and that is the conspiracy that it has described.

The Court: I do not believe the Forte case holds that, and I am not going to suppose——

Mr. Keenan: The Forte case—I say that point was 4089
not before the Forte case. That case was not before the Court on this precise question.

The Court: I do not believe the Court would have held the Government to as strict a requirement as that.

Mr. Keenan: I do not have the Forte case before me at the moment, but the language is very clear.

As your Honor will recall the language, every part of it—so that the Forte case is talking about the con-

spiracy alleged in the Forte case. It is not talking about any other.

Now, your Honor, I think that we have got to get to a point—getting a little bit ahead of our subject—that in fairness a defendant ought to be apprised of what the Government does claim the conspiracy was. And it is not sufficient merely to say It is a conspiracy to defraud. That would be hideous. It must be some kind of a conspiracy to defraud, starting with a certain time and ending at another time. I do not see why the time of the beginning and the time of the ending does not identify the conspiracy.

4091 I do not think the Government has any opposition to spreading itself all over the lot and then saying 'Well, if I can dig out any kind of a conspiracy from this proof that is offered, we are going to substitute that.'

Nor do I think that the Government can just allege a certain date and ignore it entirely. But, however that may be, certainly we have a right at some time or other, your Honor, to be informed what it is the Government does claim in this case is conspiracy.

Now, I know that they might come back and say, 'Well, they claim there was a conspiracy on the part of the two Bayers and Radovich.'

Your Honor, they do not describe any other conspiracy between the two Bayers. They say there was
4092 a conspiracy between the two Bayers and Radovich. They might have alleged that there was an initial agreement between the two Bayers subsequently joined into by Radovich, but that is not what is alleged in this indictment. Not at all. They allege a conspiracy and an agreement between the two Bayers and Radovich.

Now, to come back to the law question, your Honor: Certainly, the Forte case says that whatever the con-

spiracy is that the Government is resting upon, and there must be some agreement, there has got to be some conspiracy. It must be defined in some manner; that some time the Government must say, 'Well, we claim there were three in it, there were four in it, or five.' I do not understand that the claim is any more than three individuals in this conspiracy.

And they say that it was a conspiracy to defraud the United States Government out of the fair and impartial services of officers.

Your Honor, some time or other in a court of justice we are entitled to have the United States Attorney tell us who the officers are that he claims that 4094
we were attempting to defraud. Or name them or describe them in some manner or other. And we have not had it or heard it yet in the indictment, unless it is all the officers.

Now, in any event, under the law of the Forte case, there must be substantial evidence aliunde of every essential part of the conspiracy. That is what the Forte case says. So, therefore, in this case there must be substantial evidence aliunde of some conspiracy which is reasonably to be interpreted, I hope, within the confines of the general language used in this indictment.

Now, I say to your Honor that I do not know that the Kertess case goes that distance. I think the 4095
Kertess case—I do not want to say and I have no right to interpret it—that the Kertess case says that we are differing from the Forte case, but Mr. Justice Frank——

The Court: In what particulars?

Mr. Keenan: I say—I am not making that claim that it so states, but the language of the Kertess case is that even if we were to follow the Forte case—

4096 that is the language of that decision, which leaves it delightfully indefinite as to whether they are following it or not, to say the least.

I am saying to your Honor that if we arrive at such an important point in matters of confessions and admissions, and I am not going to waste the time of this Court in urging the importance, that the law be clear with reference thereto, and that in this great United States of ours that it be not any different treatment for someone who lives in the District of Columbia and someone who lives out in the Eighth Circuit and someone who lives here. There is a higher court above
4097 all those circuits, and we are entitled to have the interpretation of that court on this all important subject matter. It ought to be left out of the vagaries of Wigmore and Greenleaf and brought finally so that the citizens of the United States can look at some single authoritative work and say 'This is the law.'

So that is why I am saying that under the Forte case we contend and we urge with great earnestness, not sufficient perhaps to convince your Honor, that the quantum of proof aliunde offered in this case extra these admissions or confessions, so-called, does not rise to the standard required to meet the requirements set forth in the Forte case, to wit: we claim that there is not substantial evidence of a conspiracy without these confessions.

4098 Now the Kertess case refers to the Dykes case, I think it is called. We say that the Kertess case has not attempted to overrule or depart from the Forte case, but it does leave counsel, and it is humanly possible, the learned District Courts, not too clear as to whether the departure has been made from the rule in the Forte case.

I have not any right to urge any more to your Honor than I think that the Forte case is the law of

this country; and I do not think that the Kertess case has attempted to create any new rule or different rule. It does not say so. There was an entirely different set of facts quite sufficient, I think, to meet the requirements as set forth in the Forte case.

But in any event I want to confine my argument at this time to your Honor to state that we think that if the Forte case is the law, that we do not believe that there is substantial evidence of all of the essentials of the conspiracy or any conspiracy—we go that far.

I am not going to take the time to review all the evidence, but I will say in passing that they have 4100
brought witnesses and put them on the stand, the Government. I do not think the Government can call a witness like Colonel Jacobson to the stand and offer him to your Honor and to the jury as a Government witness and then just laugh about his statements. They vouch for his, generally for the truth of what he says when they put him on the witness stand as a witness. And every single witness I have asked the question whether or not Samuel Bayer or Martin Bayer in any manner did anything to attempt, as far as he could observe, to affect his judgment as an officer adversely, from the standpoint of bias and disinterestedness and faithfulness and conscientiousness and so on and so on, and all these words that are in 4101
the indictment, and each one of them answers in the negative.

So that from the witnesses who have been called, I do not recall a witness—it isn't Colonel Vidal. I asked him as broad a question as counsel could ask, perhaps most offensively broad: if in any manner, fashion or nature they tried to affect his judgment. I have asked him if they tried to affect his judgment wrongfully, or if they tried to get him into some

scheme to affect someone else's judgment. I suppose it won't be binding, his statement, but it ought to be highly persuasive, an officer of the United States Army who has been tendered to the Court and the jury as part of the Government's case.

This whole case divides itself, your Honor, from the standpoint of common sense, into two episodes: one is the uniforms and one is the money. And when you come to the uniforms, your Honor, if it were to be a fact to be argued to the Court and not to the jury, we would not hesitate to embrace that alternative as showing that if there was anything clear in
4103 this case it is that there was no conspiracy to go out and buy uniforms for these officers.

The mountain came to Mohammed, your Honor. The officers came down for the uniforms and they asked for them. There was no one who dangled uniforms in front of them and said 'Have a uniform and do something for it.'

Now I do not say it is vitally essential that in anything by way of gratuities and the like that the initiative come from the other side, but it is a pretty good indication as to whether or not there was a plan, or whether or not there was an agreement, because if this evidence is coming in at all properly about these uniforms and the amounts, I can get all through with it. The uniform business must be related to some
4104 agreement and it must be an agreement reached by and between, let us say, Samuel Bayer and Elias Bayer: 'Well, what will we do in order to affect adversely'—I am going to use that phrase—'the judgment of these officers? We are going to do what? We are going to get them uniforms.'

Your Honor, that is just plainly doing violence to the record in this case. That is not true. The evi-

dence in this case does not prove it is true and the evidence offered by the Government shows it is not true.

The evidence in this case shows, as far as these uniforms are concerned, that never were individuals more innocent of getting into difficulty. It took a little probing in cross-examination of one of the Government's witnesses to find out really what happened, as far as even the statements of so-called admissions were concerned. And I find myself, your Honor, constantly, like a cat chasing its own tail, unable to differentiate the aliunde testimony from these admissions, and I am trying to keep these separate. 4106

But even assuming that the admissions here, as far as the uniforms are concerned, it is the plainest thing in the world that first of all the uniforms came up because Vidal or Roeser said to Elias Bayer, 'What business are you in? I am in the thread business.'

'Well, you must know tailors? Yes, I do.

'Well, can you get us a uniform at discount, at cost?'

Now, your Honor, that is not our side of the testimony; that is the whole testimony. There is not any other testimony on that point. Well, that is a long distance, your Honor, if we took the theory of the Government that this was some kind of a conspiracy of these two Bayers to be lurking around in order to find out what night clubs they might find officers from Mitchel Field. 4107

It is a long distance from saying that this was a plan outlined in the beginning to go and debauch the judgment and the honesty and the service of the United States officers by giving them uniforms, when the evidence offered by the Government clearly shows that it was the officers themselves. I do not think it was in any venal manner. I say evidence of gentle-

ness on the part of these officers. I can understand how it could happen. They looked rather shamefaced when they came into this court, men of distinction and rank, talking about uniforms.

Or they may try to pass it off by saying 'I heard there was a bit of good gabardine.' But the fact was that we were in war times. It was a time when Edward G. Robinson was announcing a $100,000 gift of his own to the U. S. O., and times of generosity and entertaining men in uniforms in canteens, and everybody for the time being was doing everything for the soldiers.

4109 And in that atmosphere they have a drink around a bar and a man says, 'Are you in the business of thread?' 'Yes.' 'Do you know some tailors?' 'Yes.' 'Can I get a uniform at cost?' And that is supposed to be evidence of a conspiracy to corrupt this man.

Your Honor, I perhaps will have gone too far in discussing the evidence, with the great respect I have for this Court, but I cannot refrain from adverting to it. If you get into this evidence and if you analyze every section of it, and if you go all the way with the uniforms, what do you find? You find that the men would not pay for the uniforms. Why? You find that most of them, the uniforms were not any good. They went to these three tailors who attempted to make

4110 them look like Fifth Avenue tailors would. They were three little tailors sitting cross-legged on a bench, and they had some material and they did not know how to make the uniforms.

It is not very much of a joke if you had to earn your living that way, and had people from the Army come in and take your time.

The evidence in this case with reference to uniforms shows that the officers came in and they asked for that

courtesy, and there is no evidence, your Honor, of anything with reference to these two boys that are the subject matter of this lawsuit.

Perhaps this thing ought to be laughed at. It is perhaps a funny joke at the cost of men's reputation and a lifetime of probity and decency, which are going to be smashed to pieces, but to me it is a mighty tragic affair I can't squeeze any laughter out of any part of it at all. I think it is a desperately important thing to analyze this evidence and I am trying to do my duty as a lawyer in doing it, and I cannot find where there is any evidence aliunde of a substantial nature to show any kind of a conspiracy at all. 4112

If they came in and showed that they bought uniforms for people, but that is not the evidence, your Honor, in this case. And if it turns out to be a joke or a picayune affair of a few dollars for officers that are fastidious out there at Mitchel Field, acting like a lot of WACS about different shades of uniform, we cannot help that.

When you get all through, it is a tempest in a teapot and it does not rise to the dignity of substantial evidence to support any charge of corruption, because that is really what it is.

Your Honor, when it comes to the matter of the payment of the money, there is not evidence, your Honor, of the payment of a five-cent piece in this case aliunde of the admissions or confessions. 4113 There is no evidence of the payment or the passing of any money at all. Not a speck. Not a scintilla. There is evidence of the uniforms, whatever that means. I am not responsible. I do not know why the United States Attorney did not see fit to call witnesses that perhaps could have been called and put on the stand to prove that money was passed. There were other indictments that I cannot

close my eyes to, but all I know is that in this case there was no evidence whatsoever of any kind, nature or description of even as much as a five-cent piece passing, unless you take these admissions and these so-called confessions.

Of course we can talk about conspiracy to defraud the United States Government out of the honest and conscientious service of their officers, but everyone in this courtroom knows that as piously as we say it to this jury, this is not a question of bribery; it is not a question of conspiracy to bribe—everyone in this courtroom knows that in his heart and soul that in
4115 essence it is nothing but that.

Because what is the charge of the Government? The charge of the Government, if we can make head or tail out of it, is that there were things of value given to officers of the United States Government to affect their judgment and thereby obtain substantial favors for members of the families of the Bayers, and that the officers got the money and the Bayers paid it.

If that is not a good Anglo-Saxon description of the crime of bribery, I would like to know what it leaves out in the process.

Whether you call it bribery or—your Honor, you might just as well come before this jury and say, as they might consider one to another, or among each
4116 other: 'Well, John Smith, my neighbor, got into trouble last night.' 'Well, what happened to him?' 'Oh, there is something terrible. They have taken him away from his home. He is in a court room.' 'What is he charged with?' Wait a minute. They look and see. They read it: that the said John Smith did take the said John Brown and his right forearm and his right wrist and his right thumb and his index finger, and did press the same with great force and violence

against the trachea and the windpipe of the said John Brown for a sufficient length of time that it defrauded him out of nitrogen and oxygen for a period of hours, so they had to bury him under terra firma.

About that time someone would say, 'Well, they killed the man, didn't they?' 'Yes.' 'Why don't they say so then?'

Your Honor, in this case, of course the United States Attorney has the right to prosecute for an offense of any kind against the United States Government, but if he is prosecuting for bribery, he has not proved it. And I say to your Honor that to get any substantial evidence of the offense charged in this case in the manner in which the Government has outlined its case to the jury, you have got to get the essentials of bribery in the case. But whatever name you call it, the Government has not produced any such evidence aliunde these confessions. 4118

They have shown—they have not, your Honor, shown any entertainment excepting of a trivial nature. And to be square about this, to enforce the law as it is enforced in our own courts, and not in the French fashion that has been in vogue recently of charging him with being guilty and make him prove his innocence in this case, they show that people were taken to restaurants and bought meals. They have shown that people were given a drink now and then, but they don't connect those individuals with anything concerned with the essence of the corpus delicti, which is Martin Bayer; for example, in this case. 4119

It is of more than passing importance, your Honor, that we don't even hear these boys mentioned until Colonel Jacobson walks into the office of Samuel Bayer, his little shop, and sees the pictures of these boys on the wall and says, 'What are they doing?'.

They met Vidal and Roeser and Jacobson before these boys are known by these men to be out at Mitchel Field, before there is anything hooked up, unless we are going to have flights of fancy imagination.

Well, your Honor, I don't know whether it will serve any particular purpose to attempt further to analyze the evidence. I would like to go down one witness after another, and after all, we don't get evidence out of thin air, and I hope the time has not come where we call atmosphere substance.

If the Forte case is the law, you have got to have more than atmosphere and you have got to have more
4121 than a trickle of a suspicion here and there. You have got to have your proof rise to the dignity of substantial evidence.

Your Honor, I think it might be a fair question to ask of the United States Attorney, what does he claim outside of these so-called admissions or confessions by way of proof that rise to the dignity of substantial evidence to prove the existence of any conspiracy of the type set forth in this indictment? It is always a difficult thing attempting to prove a negative, but I think the Government—it is not up to us—at this stage to show that we have proved our innocence. I think we have a right to challenge this Court's attention to the peculiarities of this case, and it means something, your Honor. I don't think anyone has the right to laugh at
4122 my argument when I say——

The Court: Why do you keep referring to people laughing? I have not noticed any evidence of that.

Mr. Keenan: Well, I have.

The Court: I have not noticed any evidence of jocular conduct.

Mr. Keenan: I have.

The Court: Well, I have not.

Mr. Keenan: Well, that perhaps is a little feeling of my own. I ought to be experienced enough in the courtroom to throw it aside. I beg your Honor's pardon for repeating that.

But I say, with all the seriousness at my command, that if we are going to get away from atmosphere and we are going to take away these confessions and admissions, it is a pretty difficult thing, I think, for trained legal minds to do. We have got to do it, and I know, with great respect to this learned Judge, that he has laws laid out for him to follow that he must charge to juries. Every court has to act in accordance with the law and precedent. They are mighty 4124
difficult things to do. It is the law and it has to be done, but we are entitled to come to your Honor at this time and ask for a careful examination and an analysis of the aliunde evidence under any rule.

There is some requirement. You just cannot come in today with an admission or a confession and just entertain a conviction in a courtroom. You have got to prove a corpus delicti, and it has got to be something. I believe the rule is substantial evidence. It is not beyond a reasonable doubt. That is certain. It is more than a scintilla. And that, your Honor, I think is the office and function and obligation of the court, to measure up this evidence outside of these admissions and confessions, with the conscience that I know is possessed and exercised by everyone of au- 4125
thority in this courtroom, to determine whether or not under such circumstances there is any evidence at all that arises to maintain suspicion.

For example, the only way we can determine that is to forget entirely these admissions or confessions and then look at this evidence. We find evidence of what? Of the Busch man called on the witness stand. He

says that Radovich came there to get a uniform. He is asked a question, your Honor—all Government witnesses; we put on none—and he is asked the question: 'What did Elias Bayer say about who is going to pay for this uniform?' He said, 'Why, Radovich is going to pay for it.' And who says 'No', your Honor. Nobody says to the contrary. That is the testimony that comes from the witnesses.

If the evidence is that these officers asked the courtesy of coming in and having their uniforms at cost—and, your Honor, it is also significant that there is not one single witness who has testified to these uniforms
4127 that ever hooked them up in any way with the giving of a gratuity or a favor or any consideration of any venal or venial complex. Nothing.

You cannot convict men of a conspiracy and say there is a substantial conspiracy to adversely affect the judgment of officers of the United States because they ask you if you know where you can take them to get uniforms at cost and you say, 'Sure, I will try to do that.'

If we were to do that, your Honor, we would have to build concentration camps in this country and fill them with everybody that could be accused of affecting the judgment of officers.

Then the cruel thing comes in: that we all know that
4128 all types of gratuities and considerations were extended toward men in the armed services, not alone to enlisted men but to officers. People were rather proud of doing those things. You can take those matters which were perfectly innocent, your Honor, and then hook up something that happened later of which there is no evidence at all, your Honor, excepting in these extra-judicial affairs—I think I will so describe them—and then try to hook those on to conduct that is abso-

lutely compatible with innocent conduct, and is the rule rather than the exception, and then say, now, that all fits into a nebulous conspiracy to affect the judgment and defraud, with the wide use of the definition of the word. And the bright aurora flushes of crime start to come. From what? From picking a soldier out and giving him a meal. From taking an officer, who lives on limited pay in an inflationary period, even the officers, who have to go out and dandify themselves pretty well, living in the environs of Greater New York, Copacabana, etc., and taking them out to a meal at the Hickory House, where they don't feed you at the same prices as they do at Childs Restaurant. All of 4130
those things went on, and that is all the evidence that you have in this case.

It is true that you have Major Saffron, a doctor. He says that he had a talk way back, months and months before, with Sam Bayer, where Sam Bayer said that he would give anything in the world if his boy would not have to go overseas.

Well, your Honor, I had a boy that I lost a little while ago, and I want to tell you that I could have sat right at the table with Mr. Bayer and said—I mean, I would not have considered myself a criminal in so stating, or on my way to a careef of crime.

And I say that anyone that takes a perfectly innocent statement, with nothing more to it than 'I would give anything to see my boy not have to go overseas,' 4131
the expression of an honest man and nothing more. It is just like a man who said that he was afraid when he was going into battle. The greatest generals tell us those are the men who told the truth.

I say, your Honor, that a careful examination of all the evidence that has been introduced by the Government in this case, excluding these extra—that is, so-

called admissions of Radovich and of the Bayers, and you find nothing that arises above the dignity of loose suspicions and conduct that not alone is equally compatible with innocence as with guilt, but is almost compelling in the circumstance of the times in which we were living, to compel a finding of honest rather than dishonest conduct.

So therefore, your Honor, I, with great earnestness and at the risk of being quite tedious, I am afraid, ask your Honor, with all the sincerity at my command, to carefully examine the evidence aliunde to see that a great mistake is not being done and a blow being
4133 struck at something more important than reputations of individuals or obtaining successes or victories in courtrooms, but the lives of Samuel Bayer and Elias Bayer and their liberty—the fundamentals of liberty that says that 'better that 99 guilty escape than one just man be convicted.' That is the philosophy behind it.

Now I have expounded at some length my views on what constitutes admissions. This is all hearsay that is coming before your Honor—every single part of it. It is all objectionable under the hearsay rule, and it was let in only on the basis of being given in circumstances that a man knows that he is telling something that hurts him and hurts his position.

4134 I say to your Honor that reading the whole statement of the Bayers—and I think you cannot do anything else; you cannot read statements out of the context; you cannot interpret them. You have got to have the whole statement. And when you do, then I think we find in this case, as far as the two Bayers are concerned—again, your Honor, I find myself wandering into the vagaries of these so-called admissions and statements. I cannot keep away from them. I cannot separate them.

So therefore, your Honor, I am going to ask that a great effort be made to separate, to see what is the testimony outside of these so-called admissions that arise to the height that could be called substantial evidence of the commission of a crime of defrauding the United States Government. Therefore, your Honor, I make a motion that the verdict be directed for the defendants Bayer.

The Court: I do not care to hear the Government's side. As to the basis of the motion assigned by counsel that the indictment does not state a crime, I am satisfied that the indictment does state a crime and that the indictment is sufficient, and that basis is not 4136 sufficient for granting the motion.

As to the other basis of his motion, which counsel has argued at some length and with great ability, I simply cannot agree with the contention of counsel.

At the time the admissions were tendered I then very carefully reviewed in my own mind the evidence which had been introduced up to that time. I do not think it appropriate, and certainly not necessary, and I think it would be inappropriate for me to undertake to summarize the evidence, as I recall it, up until the time the admissions were tendered, but I have it very clearly in mind, in my opinion it is amply sufficient to prove a conspiracy under the strictest rules contended for by counsel for the defendants.

Of course there is no proof that at the opening of 4137 business on September 1, 1942, a conspiracy was entered into which terminated at five p. m., July 2, 1945, nor is there any proof that there was a directors' meeting of any kind, a formal gathering of any kind in an office, and a minute entered that 'We do hereby establish a conspiracy.' Of course there is no such proof as that. And it is not novel to hear the defense made

that, as to certain details of testimony, those details are not sufficient to constitute a conspiracy. But in a conspiracy charge all the evidence must be considered which is proper evidence and the circumstances, and all of them taken together, and the necessary and proper inferences to be drawn from those circumstances. And taking all the evidence which has been introduced in this case prior to the admission of the admissions or confessions, I am satisfied that that evidence was sufficient to justify the jury in believing that there was the conspiracy alleged in the indictment, and to be convinced of that beyond a reasonable doubt.

4139 So the motion is overruled and an exception may be noted" (R. pp. 697 to 717, incl., fols. 2090 to 2151, incl.).

3. The Court erred in denying the motion of the defendants Bayer at the close of the entire case for a directed verdict of acquittal in favor of the defendants Bayer, and for a dismissal of the indictment, as follows:

"Mr. Keenan: The defendants Bayer renew the motion made at the end of the Government's case that the jury be directed to return a verdict of not guilty, and renew the request of the Court for the continuance of this cause until the return of Martin Bayer, because of the development of evidence in the case demonstrating the necessity of his appearing as a

4140 witness as to matters most material.

And the defendants Bayer move now to strike out all parts of the statement—withdraw that, let it go.

The Court: The motion of the defendant Samuel Bayer——

Mr. Keenan: Another thing I would say: Furthermore, the defendants Bayer renew their motion for dismissal on the ground that the indictment fails to state a cause of action, that if the indictment be

interpreted as depending solely upon that portion of Section 88 of Title 18, having to do with defrauding the United States Government, and if it be interpreted that said section covers the alleged offense contained in the indictment, that such was the intention of Congress in enacting such Section 88 of Title 18, the same is against and in violation of the Constitution of the United States, as is demonstrated by the case of Cohen Grocery Company v. United States. I will give you the citation of that in a minute, your Honor.

The Court: All right. The motions of the defendant Samuel Bayer and Elias Bayer by counsel are 4142
overruled.

Mr. Keenan: And I would like to renew the motion on account of Elias Bayer on the ground that the evidence now shows no connection of Elias Bayer with any so-called agreement, arrangement, confederation or conspiracy to defraud the United States.

The Court: Motion overruled" (R. pp. 948, 949, fols. 2842 to 2845, incl.).

4. The Court erred in its charge to the Jury in neglecting to outline the theory of the defense, to which the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436) as follows:

"Counsel for the defendants Bayer claims that pay- 4143
ments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer" (R. p. 1134, fols. 3400, 3401).

4144 *Assignment of Errors by Defendants Bayer.*

5. The Court erred in certain instructions to the Jury to which portions of the charge the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436) as follows:

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. • • •" (R. p. 1134, fol. 3401).

4145 6. The Court erred in instructing the Jury as follows, to which the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436):

"However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants" (R. p. 1135, fol. 3403).

4146 7. The Court erred in instructing the Jury as follows, to which the defendants Bayer duly and legally excepted (R. p. 1153, fol. 3458):

"The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you

that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you not to infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name 4148
before they became Americanized. So I direct you to disregard the alias reference entirely" (R. pp. 1152, 1153, fols. 3455 to 3457, incl.).

8. The Court erred in permitting the District Attorney, in his summation, to address an inflammatory argument addressed to the passions of the Jury in times of war and in refusing to charge the Jury on the subject and in refusing to caution the Jury not to be swayed by the nature of the argument which had been made (R. pp. 1150 to 1152, fols. 3450 to 3454, incl.).

9. The Court erred in overruling the objection of the defendants Bayer to a certain portion of the summation for the Government, to which the defendants Bayer duly 4149
and legally excepted (R. p. 1046, fol. 3138) as follows:

"Now, a short time thereafter, about April 21st, the testimony was, 1943, the evidence shows that there was a party tendered to Colonel Jacobson at the Waldorf-Astoria Hotel by Sam Bayer, and that very night Sam Bayer gave a new set of tires to Jacobson. Now, you know as well as I do, ladies and gentle-

men, that in April, 1943, it was almost impossible to obtain new tires. And Jacobson's testimony is very clear about that.

Mr. Keenan: I object to that, your Honor. There is nothing in the evidence about how difficult or not it was to get tires.

The Court: I overrule the objection.

Mr. Keenan: Exception" (R. p. 1046, fols. 3137, 3138).

10. The Court erred in permitting the District Attorney, in his summation for the Government, to make an
4151 improper comparison of the statements of Sam Bayer and the defendant Radovich which read, in part, as follows:

"Now, some of the evidence with respect to the arrangement for that transfer varies. In that statement of Sam Bayer, which is in evidence, he claims that Radovich told him that the boys had to be transferred because the outfit was being broken up and that Radovich thereafter arranged the transfer to the Medical Detachment. Radovich in his statement claims that the boys were being transferred because of these unsavory rumors around the field about the entertainment. The records, this Exhibit D that we have been looking at, show that the outfit was not being broken up, as Sam Bayer says Radovich told him, but
4152 that actually there was a shortage of clerks. And, in fact, the transfer was not able to be effected until two men came into the First Fighter Command to replace Martin Bayer and Melvin Usdan" (R. pp. 1048, 1049, fols. 3144, 3145)

and, further:

"Somewhere about the time that the boys were transferred out of the Air Commando Group to the

Air Transport Command, Sam Bayer, through some agents of his, paid $5,000 to Major Radovich. There is no conflict between the statements of the Bayers and the statements of Radovich on that fact" (R. p. 1057, fol. 3169).

11. The Court erred in allowing the District Attorney to state, over the defendants' Bayer objection and exception, that there is no contention by the defense that the statements of the defendants Bayer were other than voluntary, since objection had been made to these statements on the ground that they were "induced" (R. pp. 1060 to 1062, incl., fols. 3180 to 3184, incl.). 4154

12. The Court erred in permitting the District Attorney, in his summation, to refer to the statements of the two defendants Bayer and of Radovich in juxtaposition, really using one against the others and comparing them, which was in violation of the Court's admonition that the statements of each defendant could only be considered against him individually (R. pp. 1059, 1060, fols. 3175 to 3180, incl.).

13. The Court erred in overruling the objection to that part of the summation for the Government as follows:

"• • • let us look at the record and see what Sam Bayer's statement shows as to his participation in the conspiracy. It shows the following: 4155

One, that he entertained various officers, all of whom were connected with the unit at Mitchel Field to which the boys were attached.

Two, that he paid for uniforms for these officers.

Three, that he made numerous gifts to Radovich.

Four, that he paid approximately $2,000 to Radovich during the time when the boys were being trans-

ferred from Radovich's First Fighter Command to the Medical Detachment at the base at Mitchel Field.

And, five, that he sent $5,000 to Radovich for the transfer of the boys out of the Commando Unit to a unit which was destined to stay in this country.

Now, let us see——

Mr. Keenan: Just a moment. I object to that statement. That summation is absolutely false. He made no such admission in that statement. I object to it.

The Court: Mr. Keenan, it is perfectly apparent that the United States Attorney is not quoting from
4157 it; he is giving a summary of what he considers it to mean. The statement itself will be before the jury. The District Attorney is not purporting to read from it. He is arguing what he considers to be a synopsis of the case.

Mr. Keenan: But, your Honor, he is now quoting the admission, not a synopsis of the case.

The Court: No. He is not undertaking to quote at all. You may proceed" (R. p. 1059, fols. 3175 to 3177, incl.).

14. The Court erred in receiving in evidence Government's Exhibit 5 (Ledger [page 4] I. Buss Uniform Co.) (R. p. 1218, fol. 3654) to which the defendants Bayer duly and legally objected as follows:

4158 "Mr. McGohey: Now I offer the book in evidence your Honor.

Mr. Keenan: Objected to.

Mr. Robb: May we see it?

Mr. McGohey: I am offering only that page at this time.

The Court: You said you offered the book.

Mr. McGohey: I withdraw that. I intend to offer only the page that I showed to the witness.

Mr. Keenan: The record ought to show what page it is.

Mr. McGohey: The page entitled, 'Mitchel Field, New York, U. S. Army.'

Mr. Keenan: 'Mitchel Field, New York, United States Army.'

Mr. McGohey: That is right. That is the page.

The Court: Is there objection, gentlemen?

Mr. Keenan: Yes, your Honor. We object to this. We understand that the Government is offering it on the theory that it was part of the conspiracy to conceal, and your making the suggestion that not necessarily would the conspiracy terminate with the departure of Major Radovich for the war in the Pacific on November 5th, 1943, we think, your Honor, with great respect, that it indulges in flights of fancy in the ridiculous assumption that there would be a continuing conspiracy to which Major Radovich would take part when he was at the same time thousands of miles away from the scene, in the United States Army, engaged in war. In other words, we think that there is entitled to be some sense to the allegation of the terms or agreement of the conspiracy. And we are alleging that we are objecting on that ground. 4160

The Court: Rather strenuously, I would say.

Mr. Robb: We object also, if the Court please, on the ground that these acts and conversations took place after any conspiracy which may have ever existed even which could be alleged to exist had terminated. We think that should not be admitted against the defendant Radovich for that reason. 4161

The Court: Objections overruled. The page may be received" (R. pp. 191, 192, fols. 571 to 575, incl.).

15. The Court erred in receiving in evidence Government's Exhibit 6 (page 74 of cash book—I. Buss Uniform

Co.) (R. pp. 1220, 1221) to which the defendants Bayer duly and legally objected and excepted as follows:

"Q. Now are the entries that appear on page 74 of this book in your handwriting, Mr. Busch? A. Yes.

Q. Is that a book that is kept in the regular course of your business? A. Yes.

Q. Is that a book in which you enter the receipts of cash which come into your company each day? A. That is right.

Mr. McGohey: I offer page 74 of this book in evidence.

4163 Mr. Robb: We make the same objection, your Honor.

The Court: I hope the objection will be in more temperate language.

Mr. Robb: I hadn't thought I was being intemperate, if the Court please.

The Court: Quite so.

Mr. Robb: Very earnest, though.

The Court: Objection overruled. Exception may be noted.

Mr. Keenan: We have the same objection, your Honor.

(Government's Exhibit 6 received in evidence.)" (R. p. 193, fols. 377, 378.)

4164 16. The Court erred in receiving in evidence Government's Exhibit 7 (Entries of items 5512, 5580 and 5604 in record book of I. Buss Uniform Co.) (R. pp. 1222, 1223), to which the defendants Bayer duly and legally objected as follows:

"Mr. McGohey: Now, if your Honor please, I would like to offer the entries appearing as items 5512, 5580 and 5604 from this book as evidence.

Mr. Robb: We make the same objection.

Mr. Keenan: I have never seen the book. I would like to see it. We object to that on the same theory, your Honor.

The Court: Objections overruled.

Mr. Robb: The same objection for the defendant Radovich. Exception.

(Government's Exhibit 7 received in evidence.)" (R. p. 195, fols. 580 to 583, incl.)

17. The Court erred in permitting John J. Pepper, a Government witness, to testify as to conversations that he had with Captain Radovich, to which the defendants Bayer 4166
duly and legally objected and excepted (R. p. 208, fols. 622, 623) as follows:

"Q. Will you tell us what Captain Radovich said and you said?

Mr. Keenan: I object to the conversation.

The Court: Overruled. Go ahead Captain.

A. We had just a general conversation. Some time during the conversation the men—the names of the two men came up—this man Bayer. I told Captain Radovich of the rumors which were rampant at Mitchel Field at that time concerning the two men, those rumors being——

4167

Mr. Keenan: I object.

The Court: I don't know what the rumors were, Captain, but I do want you to tell the Court and jury what you told Captain Radovich; just what you told him in the conversation.

Q. Tell us what you said to Captain Radovich? A. I told him I had been——

Mr. Keenan: Objection.

The Court: Objection overruled. Go ahead.

A. (Continuing) Told that there was a remarkable similarity in uniforms worn by different people on the base, and that people in the home districts where the men lived were also complaining about the fact that they had spent so much time at home, which was unusual for low ranking men—it is usually restricted to the first three grades. I also repeated to him the fact that they appeared to have claimed that they were established at Mitchel Field. Major, Captain Radovich at the time, made no substantial comment that I can recall.

Mr. Keenan: I ask that all that be stricken out.

4169 The Court: Motion overruled.

Mr. Keenan: Exception.

Q. Was there anything said in that conversation about a transfer of these men to the medical unit?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.

Mr. Keenan: Exception" (R. pp. 207, 208, fols. 620 to 623, incl.).

18. The Court erred in receiving proof as against the defendants Bayer of the receipt of a cashier's check in the sum of $500.00 by Captain John K. Pepper, and in denying the motion to strike out said testimony, to which the de-

4170 fendants Bayer duly and legally objected and excepted (R. p. 213, fols. 637 to 639, incl.) as follows:

"Q. Now, in December of 1943, did you receive in the mail a cashier's check in the sum of $500? A. I did.

Q. Did you know at the time you received it by whom it had been sent? A. I received a check in an envelope which was postmarked from West Palm Beach,

Florida, and in the envelope was a cashier's check drawn on a West Palm Beach bank. The check surprised me, and I kept it for two or three days, wondering first what it was, and who from. Finally, knowing that no one owed me that money and I had no relative who would ever send me a check like that, I decided that the Air Commando Group must have moved or be moving, and it must have been from Major Radovich.

Q. Did you subsequently find out——

Mr. Keenan: Just a minute. Your Honor, I ask that all that answer be stricken out and this jury instructed by this Court to disregard every single word of it. 4172

The Court: I shall grant that motion. I will strike that out and direct you ladies and gentlemen not to consider that at all.

Mr. McGohey: Do I understand your Honor is striking out the testimony that he received the check?

The Court: No, not that; only the surmise as to where it came from. That is a surmise and I will direct you not to consider that.

Mr. Keenan: Your Honor, we object to any evidence of his receiving a check. Is it charged that we sent that check? We haven't heard of that yet.

Mr. McGohey: May I proceed?

The Court: You may proceed.

Mr. Keenan: We object to this, and the jury being left to consider the fact that this man had received a check unless there is some showing or some charge made as to who sent it. 4173

The Court: Objection overruled.

Mr. Keenan: Exception.

Q. Did you subsequently find out who sent that check to you?

Mr. Keenan: I object.

Mr. Robb: We object to that.

Mr. Keenan: It is highly improper.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. Robb: Exception.

The Court: You were asked did you find out.

The Witness: Yes, I did" (R. pp. 212, 213, fols. 634 to 639, incl.).

19. The Court erred in examining and reading statements made by Samuel Bayer, Elias Bayer and Walter V. Radovich without giving the attorney for the defendants
4175 Bayer an opportunity to examine said statements at that time and without requiring the prosecution to give a copy of said statements to the attorney for the defendants Bayer, to which procedure the defendants Bayer duly objected and excepted (R. p. 360, fols. 1078 to 1080, incl.) as follows:

"The Court: I would not permit the Government to put in the full statement for the reason that the statements which I have read are prolix and contain a substantial amount of matter which is immaterial and irrelevant. If at the conclusion of this witness' testimony defendants, or any of them, wish to introduce the full text of the statement, I will consider that when we get to it.

4176 Mr. Keenan: Could we have the record show, your Honor, what statements your Honor examined, that you referred to?

The Court: I have examined statements made by Samuel Bayer, Elias Bayer and the defendant Radovich. If you wish the dates, the District Attorney can give them to you. Will you be ready to proceed in ten minutes?

Mr. McGohey: Yes, I think so.

Mr. Robb: If the Court please, we have not seen those statements to which your Honor referred as those which you had examined. May we have copies of those?

The Court: I don't think it necessary to require the Government to produce the statements. You are not taken by surprise. Your associate counsel, Mr. Keenan, was present throughout the taking of his clients' statements; you were present at the court-martial trial of your client, and I don't understand that there is anything to take any of you by surprise.

Mr. Robb: It occurs to me that if the Court examined them counsel should also have them. 4178

The Court: It does not so occur to me. I examined them for the purpose of determining whether or not I should admit evidence with relation to them. There are many instances when the Court may properly——

Mr. Robb: I bow to your Honor's ruling. May I have an exception to your Honor's ruling?

Mr. Keenan: May I have an exception to your Honor's reference, with great respect, both to your Honor and to the distinguished General Ansell and his colleague, that we are associate counsel. We are not associate counsel.

The Court: The Court used that word inadvertently and retracts it. I understand——

Mr. Keenan: Nor have I any knowledge of what was contained in the Radovich statement, nor have I ever seen it, nor have I been tendered a copy of the statement that was made back some time in January or February of this year. And I was present only at a part of the court-martial and was respectfully requested to leave during other parts of the proceeding, through no fault of my own. 4179

The Court: I assumed that.

Mr. Keenan: And I am caught by surprise in that I do not claim, and I say this seriously, your Honor, that I have any unusual memory and I do not purport to remember everything that is in the statement accurately, and since I assume that your Honor is referring to a stenographic statement that was purported to have been taken down by competent reporters and transcribed, and it was of considerable length, I take exception to your Honor's failing to require us to get a copy and, with the greatest respect to this Court, to this Court examining those without counsel—without myself having the right to inspect them or knowing
4181 what is in them, or testing their accurateness with even my own memory. And I take exception to your Honor taking any consideration in passing upon any phase of this case instruments so delivered to your Honor.

The Court: Very well" (R. pp. 212, 213, fols. 634 to 639, incl.).

20. The Court erred in denying a motion for the withdrawal of a juror and a mistrial on the ground that the Court read the statements of all three defendants, to which the defendants Bayer duly and legally excepted (R. p. 362, fol. 10[illegible] as follows:

"(The following proceedings took place at the bench, without the hearing of the jury:)

4182 Mr. Ansell: If your Honor please, we want to move for the withdrawal of a juror and a mistrial in this case grounded upon the fact that your Honor has read the statement of Sam Bayer.

The Court: All three defendants.

Mr. Ansell: Of all three defendants.

The Court: All right, sir. Motion overruled.

Mr. Ansell: Thank you, sir.

Mr. Robb: Exception.

Mr. Keenan: We take an exception on the same ground.

The Court: Very well.

Mr. Keenan: We join in the same motion.

The Court: That is all right" (R. p. 362, fols. 1084, 1085).

21. The Court erred in receiving in evidence Government's Exhibits 8 and 9 (Statement of Samuel Bayer and Stenographer's notes, pages 155-163—Neisner) (R. pp. 1224 to 1231, incl., fols. 3670 to 3791, incl.), to which admission in evidence the defendants Bayer duly and legally objected and excepted (R. p. 491, fol. 1471) as follows: 4184

"The Court: All right, you may be excused. And the exhibits offered pursuant to this testimony will be admitted. Call the next witness.

Mr. Keenan: The record shows our objection——

Mr. McGohey: I didn't hear what was said.

The Court: I understood your objection to be to the admission of the statement until it had been identified and authenticated by a witness.

Mr. Keenan: I did not say that, your Honor. I object to the introduction of it on the ground that it is inadmissible for reasons that were urged before your Honor for a full afternoon in this court room.

The Court: Oh. That objection will be overruled. Exception noted. With the same—— 4185

Mr. Robb: I hadn't thought of that, because we also objected on that ground, but on that ground alone——

The Court: Very well, then, and it may be considered that the same objection is made to all the different portions on both sides.

Mr. Robb: Yes, sir.

The Court: That objection being, ladies and gentlemen, as to the admissibility, and I repeat to you what

I said when the verbal testimony from the witness was admitted, that you are to consider these statements as evidence in your consideration of the case of the person making the statement, but not consider it as evidence as to the co-defendants. All right, call the next witness.

(Government's Exhibits 8 and 9 for Identification received in evidence.)

The Court: That admonition goes throughout all the statements presently involved.

Mr. Keenan: If your Honor please, I want to renew the objection on the additional ground that your
4187 Honor has already stated that you would not permit some of the exhibits which you read to be introduced because of extraneous matter that you thought was not proper to be introduced in this court. I don't know which your Honor had reference to. But I want to save my objection and exception in the event it is contained in either of these two documents.

The Court: You will have to make your objection more specific than that. If you wish to object to any particular portion I will hear it.

Mr. Keenan: I can only say to your Honor that I can't make it any more specific from the information I have. And, furthermore, I make an objection to it on the ground that it is improper to introduce in bulk
4188 a statement of that kind without seeing whether there is prejudicial matter that is not germane to this case under the rules of evidence, and I cite to your Honor the case of——

The Court: No, I don't want to hear a legal argument, sir.

Mr. Keenan: All right, your Honor. I am willing to give it.

The Court: That is, on that matter. I have admitted a certain portion of the statement. If there is another one offered I will pass on it when it is presented. If you have a specific objection I will entertain it. Proceed" (R. pp. 490 to 492, incl., fols. 1469 to 1475, incl.).

22. The Court erred in receiving in evidence Government's Exhibits 10 and 11 (Statement of Samuel Bayer—Feb. 7, 1945—44 pages, and Statement of Samuel Bayer [continuation of statement taken by steno. F. M.], R. pp. 1231 to 1245, incl., fols. 3692 to 3735, incl.), to which admission into evidence the defendants Bayer duly and 4190
legally objected and excepted (R. p. 495, fol. 1483) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibits 10 and 11.

Mr. Keenan: I object. I don't care for any voir dire examination. I am objecting to these exhibits coming in.

The Court: All right, sir. Objection overruled.

Mr. Keenan: And I want to state the specific ground in the language of the Court, that it contains material that has not been proven or shown to be germane to the issues of this case, and improper.

The Court: I am going to do this about that. Let me finish with this situation. It is my understanding 4191
that you do not propose to read these exhibits to the jury at this time, or do you?

Mr. McGohey: I do not propose to read them at this time, your Honor.

The Court: All right. Well, now, inasmuch as the exhibit is somewhat lengthy, I am going to suggest, or direct that as to any matter in any of the exhibits which you consider and which you contend is irrele-

vant and immaterial and inadmissible for that ground, that you take time to consider the matter and make a motion to strike such matter as you consider improper, upon that ground.

Mr. Keenan: I except to your Honor's ruling on that point, on these following grounds: that your Honor has already permitted to be introduced without qualification and over objection, and with great respect, without desiring to listen to legal argument, for the reason for the objection, and now in the presence of the jury an anomalous proceeding is taking place in which it is suggested that after it has been introduced over objection it may be restricted by a motion to strike, and that such direction is being made by the Court in the presence of the jury, which is prejudicial to the defendants, and I except on that ground, your Honor.

4193

The Court: Motion overruled.

Mr. Robb: If the Court please, may I address your Honor?

The Court: Yes, sir.

Mr. Robb: If the Court please, we have been more or less on the outside looking in on this particular matter. I haven't had a chance yet to see these statements. I have glanced at them, I glanced at them this morning very briefly while I was having my breakfast. I think the jury ought to have these stenographic statements so far as they have anything to do with this case, but I understood from your Honor that these statements may contain some matters which do not have to do with this case. I would like to have a chance to read them prior to their being read to the jury, to see if there is anything in there which ought not to go in.

4194

The Court: It is exactly that that I suggested.

Mr. Robb: Yes, sir. Your Honor's thoughts and mine run along the same channel.

The Court: I would be glad to let you have that privilege and entertain at any time before they are read any motion which you may wish to make as to materiality of any particular portion of the statement.

Mr. Robb: Before they are read, yes.

The Court: Yes.

Mr. Keenan: I would like the record to show, your Honor, that we make our objection, and in view of the Court's statement that he had already examined these exhibits and that if they were offered, some of them; he would not permit them to be brought into 4196
this case because he felt there was material in them that was improper.

The Court: I think you have stated your position.

Mr. Keenan: Thank you, your Honor.

The Court: Objection overruled, with the understanding that if you desire to move to strike out any portion thereof, as to immateriality, I will consider your motion. Proceed.

Mr. McGohey: Your Honor, may the record state that the very copies of transcript which are now being introduced were delivered to counsel for Samuel Bayer and Elias Bayer yesterday afternoon.

The Court: I think the record already so shows.

Mr. Robb: That is true, if your Honor please, but 4197
I didn't get a chance to see them; and I am not counsel for Samuel and Elias Bayer.

The Court: I understand that. Go ahead.

(Government's Exhibits 10 and 11 for Identification received in evidence.)

Mr. Keenan: I think the record also should show, your Honor, that when I called for them for the week-end, so that I would have time to look them over, the

United States Attorney refused to permit me to see them.

The Court: Your statement may go in. All right, sir.

Mr. McGohey: Just one more question of this witness" (R. pp. 494 to 496, incl., fols. 1480 to 1487, incl.).

23. The Court erred in receiving in evidence Government's Exhibits 12 and 13 (Stenographer's notes—D'Elia—pages 39 to one-half of 46, and continuation of Statement of Samuel Bayer) (R. pp. 1245 to 1250, incl., fols. 3735 to 3749, incl.) to which admission into evidence the defendants
4199 Bayer duly and legally objected (R. p. 498, fol. 1493) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibit 12 for Identification and 13 for Identification.

Mr. Cohen: How many pages?

Mr. McGohey: Of the transcript? Four and a half.

Mr. Cohen: Five pages.

Mr. Keenan: We object, for the same reasons stated before, your Honor.

The Court: Very well, the objection is overruled and the exhibits accepted upon the same terms and conditions as those previously offered. Proceed.

(Government's Exhibits 12 and 13 for Identification received in evidence.)"

4200

24. The Court erred in receiving in evidence Government's Exhibits 14 and 15 (Stenographer's notes—Reitman—pages 1 to 15; continuation of Statement of Samuel Bayer) (R. pp. 1250 to 1260, incl., fols. 3750 to 3780, incl.) to which admission into evidence the defendants Bayer duly and legally objected (R. p. 500, fols. 1499, 1500) as follows:

"Mr. McGohey: I offer Government's Exhibits 14 for Identification and 15 for Identification in evidence.

Mr. Keenan: May the record show the same objection for the same reasons?

The Court: On the part of counsel for all defendants, the same objection. The same ruling. The exhibits are admitted under the same terms and conditions. Proceed.

(Government's Exhibits 14 and 15 for Identification received in evidence.)" (R. p. 500, fols. 1499, 1500.)

25. The Court erred in receiving in evidence Government's Exhibits 16 and 17 (Stenographer's notes—Kravet—pages 179 to 189, and continuation of Statement of Samuel Bayer) (R. pp. 1260 to 1268, incl., fols. 3780 to 3804, incl.), 4202 to which admission into evidence the defendants Bayer duly and legally objected (R. p. 503, fol. 1509) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibits 16 for Identification and 17 for Identification.

Mr. Keenan: We object, your Honor, for the same reasons, the former reasons stated.

The Court: The objection of counsel for all parties is overruled and the exhibits are admitted under the same terms and conditions as those previously stated. Any questions of this lady?

(Government's Exhibits 16 and 17 for Identification received in evidence." (R. pp. 503, 504, fols. 1509, 1510.)

4203

26. The Court erred in receiving in evidence Government's Exhibits 18, 19, 20, 21 and 22 (Statement of Samuel Bayer, cont'd from EPK; Statement of Elias Bayer; Statement [cont'd] of Elias Bayer; Statement of Elias Bayer [cont'd] from EKI; and continuation of Statement of Elias Bayer) (R. pp. 1269 to 1304, incl., fols. 3805 to 3911, incl.) to which admission into evidence the defendants

Bayer duly and legally objected. (R. p. 505, fol. 1513) as follows:

"The Court: All right. Let it be so stipulated and the documents offered and admitted over the same objections of counsel for both defendants under the same terms and conditions.

Mr. McGohey: Then, your Honor, may I have them all marked?

The Court: Yes. Just have them all marked and introduced as I indicated, and while you are doing that we will take a ten-minute recess, ladies and gentlemen.

Mr. McGohey. Your Honor, perhaps to save time,
4205 there are four sets of papers comprising the statement of Elias. Could we have them all marked as one exhibit? I withdraw that request, your Honor, and we will have the transcription of each——

The Court: Let it be uniform.

Mr. McGohey: And have each one of them marked in order, marked in evidence.

(Government's Exhibits 18, 19, 20, 21 and 22 received in evidence.)" (R. p. 505, fols. 1513, 1514.)

27. The Court erred in receiving in evidence Government's Exhibit 25 (Copy Statement of Major Radovich made to F. B. I. Agents) (R. pp. 1306 to 1312, incl., fols. 3916 to 3934, incl.) to which admission into evidence the
4206 defendants Bayer duly and legally objected and excepted (R. pp. 659, 660, fols. 1977, 1979, 1980) as follows:

"The Court: Call the jury. I might say that I will limit the statements to the jury's consideration of the charge against the defendant Radovich as I have to the other statements.

Mr. Keenan: We still want our exception noted.

The Court: Yes, it has been. Where is your witness?

Mr. McGohey: Mr. Flynn was my witness, but I am just going to offer the statement. It has been identified. Yes, I think we had better call the witness Flynn.

The Court: Yes, I think you had better have him back on the stand.

(The following proceedings took place before the jury:)

GERALD J. FLYNN resumed the stand.

The Court: Ladies and gentlemen of the jury, when 4208
we parted company there had been offered in evidence a statement which this witness, Mr. Flynn, testified was made to him in March, 1945, and reduced to writing and signed by the defendant Radovich.

I charge you now in similar fashion to the way I charged you when I admitted statements made by the defendants Samuel and Elias Bayer. I am admitting this statement made by the defendant Radovich for your consideration of the charges here made against the defendant Radovich. I charge you specially that you should not consider this statement or anything in it in your consideration of the cases against the two Bayers. You may consider it and give it such weight as you feel inclined to in your consideration of the 4209
case against the defendant Radovich. All right, you may proceed.

Mr. McGohey: I now offer in evidence Government's Exhibit 25 for Identification.

Mr. Robb: If the Court pleases, may we have our objection and exception to this?

The Court: Very well.

4210 Mr. Keenan: And I want to again renew my objection to a charge to the jury, to ask them to recall the incidents set forth in this paper that is introduced, or about to be introduced or received, as against Major Radovich only, and not as against the two defendants Bayer, on the ground of the practical impossibility of any jury being able to make such distinction and hold it throughout the course of a long trial to their ultimate deliberation.

The Court: Very well. The objection is overruled. You may proceed.

(Government's Exhibit 25 for Identification received
4211 in evidence.)

Mr. McGohey: I have no further questions of this witness, your Honor.

The Court: All right. Do you wish to cross-examine?" (R. pp. 659 to 661, incl., fols. 1976 to 1981, incl.).

28. The Court erred in refusing to permit the defendants Bayer, through their counsel, to cross-examine the Government's witness Gerald J. Flynn in connection with Government's Exhibit 25, to which the defendants Bayer duly and legally excepted (R. p. 672, fols. 2014, 2015) as follows:

4212 "Mr. Keenan: I would say to your Honor that I think it would be logical that I ought here to pursue this line of inquiry of this witness or not be permitted to interrogate him at all at this time.

The Court: Do you wish to be heard further on it?

Mr. Keenan: No, that is all, your Honor.

The Court: Well, with a personal reluctance, but being satisfied of the legal correctness, I am going to hold that you have no right to cross-examine this wit-

ness because his testimony does not refer or apply to the defendants whom you represent. It is my understanding that you do not represent the defendant Radovich.

Mr. Keenan: No, your Honor. That is very clear, I do not represent him. He is very ably and capably represented by the distinguished former Judge Advocate General, General Ansell, and Mr. Robb.

The Court: I concur in the last part of your statement entirely. It is the ruling of the Court that the counsel for the defendants Bayer may not cross-examine upon the statement just introduced, and I take it that you wish to except. 4214

Mr. Keenan: Yes, your Honor. Thank you for the exception.

The Court: All right. Do you wish to be heard on this matter?

Mr. Robb: No, your Honor.

The Court: All right. Bring the jury in.

(The following proceedings took place before the jury:)

The Court: All right, you may proceed, gentlemen" (R. pp. 671, 672, fols. 2012 to 2015, incl.).

29. The Court erred in refusing the request of the defendants Bayer for the statement made by the defendants Radovich in the hospital ward, to which the defendants Bayer duly and legally excepted (R. p. 681, fol. 2042) as 4215 follows:

"Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception.

The Court: Yes" (R. p. 681, fols. 2041; 2042).

30. The Court erred in overruling the motion made by
4217 the defendants Bayer to be apprised as to which officers the defendants Bayer attempted to influence, to which the defendants Bayer duly and legally excepted (R. p. 687, fols. 2059, 2060) as follows:

"Mr. Keenan: At this point, your Honor, in view of the suggestion of moving to strike out parts that are not material, I think it is entirely proper at this time to ask the Government if it will state what officers it refers to in this indictment besides Radovich that these defendants conspired with to defraud the Government by influencing their judgment, by failing to have it free from impartiality and in direction and the like. I think that is a fair time to ask this, your Honor. Otherwise I won't know how to state what suggestions
4218 there may be about striking out evidence that your Honor has so kindly suggested we do with reference to this statement introduced by the prosecution.

Mr. McGohey: Your Honor, I will withdraw that suggestion that we leave out any part of the statement your Honor has admitted it all in evidence. We will go ahead and read it. As far as the declaration demanded by counsel, I don't think I have to make it and I decline to make it.

Mr. Keenan: Regardless of any withdrawal or otherwise of Mr. McGohey, I suggest to your Honor that it is the timely inquiry of defense counsel, if the suggestion of your Honor that we move to strike out anything in these statements is to mean anything, that we ought to be apprised at this time what officers the Government contends these three so-called conspirators attempted to influence, whose judgment they attempted to influence, because I won't be able to properly move without having that information. And with great respect I point out to your Honor that the indictment uses just the word 'officers.' I have listened attentively to find out which ones they meant, and each 4220
one as they appeared on the witness stand, offered by the Government as witnesses I have asked them if any effort was made to influence their judgment and I have the reply—a negative reply from each one. I don't know how near the Government is to the termination of its case, but I do say that there is a time when we should be advised what officers the Government claims we attempted to subvert, whose judgment we attempted to subvert.

The Court: The motion is overruled.

Mr. Keenan: I note an exception" (R. pp. 686, 687, fols. 2056 to 2060, incl.).

31. The Court erred in refusing to permit the defendants Bayer to cross-examine the witness William J. Pender 4221
to which the defendants Bayer duly and legally excepted (R. p. 743, fol. 2228) as follows:

"Mr. Keenan: I would like to ask a question, your Honor.

The Court: I will have to deny you that privilege, sir, if it bears on Radovich's statement.

Mr. Keenan: We feel that it bears on the whole case, the type of man that the Bayers were dealing with.

The Court: I have ruled on that.

Mr. Keenan: All right. Note my exception, please.

The Court: Very well" (R. p. 743, fol. 2228).

32. The Court erred in refusing to permit the defendants Bayer to examine the witness Edward C. Wallace with respect to the statement of Captain Radovich, to which the defendants Bayer duly and legally excepted (R. pp. 815, 817, fols. 2444, 2449, 2450) as follows:

4223 "*Direct examination by Mr. Keenan.*

Q. You are Mr. Wallace, the Assistant United States Attorney, and you have previously testified in this case, is that correct? A. That is correct.

Q. And you have had charge of the preparation, you have had charge, as Assistant United States Attorney, of this prosecution from its inception to date; is that not correct? A. That is correct.

Q. Under, of course, Mr. McGohey, the United States Attorney? A. That is correct.

Q. And you had Major Radovich come to your office at some time in 1943?

Mr. Robb: If the Court please, might counsel approach the bench at this point?

4224 The Court: Yes.

(The following proceedings took place at the bench, not in the hearing of the jury:)

The Court: What is in your mind?

Mr. Robb: If your Honor please, we find ourselves——

The Court: What I had in mind was, I have ruled that—as to the statement of Radovich that I

have directed the jury, and will direct them again, that it is not to be considered against your client, and I ruled that you could not examine him on that question.

Mr. Robb: That is the point I had in mind, your Honor.

Mr. Keenan: Yes, but I want to bring out that a part of the defense in this case, the attitude of the United States Government in this prosecution as it affects not alone the presentation of the matter against Radovich, but against my defendants, the Bayers, that the sequence shows pressure being brought to bear on Major Radovich with reference 4226
to his testimony, and we have a right to have Major Radovich available as a witness to tell the truth, free from any type of pressure or influence. And the evidence shows that he was subpoenaed down here and that indictments were returned against Samuel and Elias Bayer—Samuel, two substantive indictments for bribery, and Samuel and Elias together with Greenblatt for conspiracy to violate Section 91, I believe, of Title 18, and that as long as Radovich continued to co-operate with the Government, as they called it, they did not indict him, but when he refused to co-operate with them he was indicted.

Now, as a circumstance of the case I think I have
a right to show this to the jury as reflecting upon 4227
the opportunity this defendant has had to present its defense in all aspects, and I think that is highly pertinent, your Honor. It is significant that he was brought back to be interrogated.

The Court: I can't agree with you. I am going to adhere to the ruling heretofore made, which ruling is that based upon everything you have said that

would only go to the admissibility of the weight of Radovich's statement, which I have directed the jury may not be considered against your clients, and I adhere to that ruling and decline to permit you to examine or cross-examine the witness on the stand as you indicated you desired to.

Mr. Keenan: While I do not contend that is the only reason I am asking the testimony of this witness, I ask your Honor, too, to give consideration to the fact that anything that the jury considers by way of any testimony that builds up a corpus delicti is material to all defendants in the case. That we have
4229 not, I think, argued fairly enough to your Honor—perhaps you have given a little time——

The Court: You have covered——

Mr. Keenan: I never mentioned that point in the argument, that anything that is built, any testimony that builds up any part of the corpus delicti is material to any defendant in the case.

The Court: I have considered that phase, too. I adhere to my ruling. You may note your exception.

Mr. Keenan: Does that mean I can't ask Mr. Wallace any questions?

The Court: You can't ask him any questions along the line you have indicated. You are perfectly free to examine him as to the facts and circumstances of the statements made by the defendants whom you
4230 represent.

Mr. Keenan: I am not going to use him as my witness for that purpose.

I note an exception.

The Court: Very well.

All right, you may stand down.

(Witness excused.)

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Call the next witness.

Mr. Keenan: I want to ask him some other questions not connected with——

The Court: All right.

EDWARD C. WALLACE resumed.

*Direct examination by Mr. Keenan.*

Q. Mr. Wallace, you have testified in this case about three indictments that were brought against Samuel Bayer other than this indictment——

Mr. McGohey: I object to this, if your Honor please, as being immaterial in this case. 4232

The Court: Unless there is some reason which I don't know about, I am going to exclude any testimony about any other indictment. These defendants are on trial on this indictment.

Mr. Keenan: Your Honor, it is our claim in this case——

Mr. Gohey: If your Honor please, if we are going to have argument I suggest it be at the bench, on this question.

The Court: I beg your pardon.

Mr. McGohey: I suggest that any argument we are going to have——

The Court: If he makes it in the absence of the jury, if he wants to be heard at length——

Mr. Keenan: Your Honor wishes that we, ap- 4233
proach the bench and state the——

The Court: Any argument on——

Mr. Keenan: I don't want to argue it, your Honor. I want to present the theory under which we are offering the evidence.

The Court: All right, sir, come up?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: The theory under which we offer this evidence is that the charges that are made in the indictment upon which these defendants Bayer are standing trial are tantamount to a charge of bribery, and that the real issue in the case as it is now presented, as we take it, is whether or not the defendants were guilty of bribery or subjects of extortion; that we are going to argue that the Government well recognizes that there wasn't bribery because it not alone could have but did indict on charges of bribery and dismiss the causes.

The Court: I sustain the objection and decline to allow any examination on that.

Mr. Keenan: You give us an exception on that, your Honor?

The Court: Yes.

Mr. Keenan: And upon that entire line of testimony that we so offer.

The Court: Yes.

Mr. Keenan: I note an exception.

(The proceedings were resumed within the hearing of the jury as follows:)

Mr. Keenan: We don't have any testimony of Mr. Wallace for the time being.

The Court: All right. Call your next witness.

(Witness excused.)" (R. pp. 813 to 817, incl., fols. 2437 to 2450, incl.)

33. The Court erred in refusing to compel the production of the defendant Radovich's statement of September 6, 1944 for examination by the defendants Bayer, to which refusal the defendants Bayer duly and legally excepted (R. p. 902, fol. 2705) as follows:

"Mr. Keenan: Now, I would like to read, your Honor—I understand the United States Attorney

wants to examine some papers and then cross-examine this witness later on, is that correct?

Mr. McGohey: Perhaps.

The Court: Maybe.

Mr. McGohey: I say perhaps, your Honor.

Mr. Keenan: All right, I am very glad to go forward and read this, if I may be permitted to.

The Court: Yes, very well.

Mr. Cohen: Pardon me for batting for Mr. Keenan.

(Mr. Cohen reads Defendants' Exhibit G to the jury.)

The Court: Have you further testimony, Mr. Keenan?

4238

Mr. Keenan: I call upon the United States Attorney to produce a statement made by Walter Radovich—

Mr. Robb: If the Court please, may we approach the bench for this?

The Court: All right, come up.

(The following took place at the bench:)

The Court: What have you to say about this document?

Mr. McGohey: Let me see what the first item is? I do not think they are entitled to that, your Honor. I have not offered that in evidence. I have offered a statement of March. It has no relation at all with the statement of September. It has been referred to, it is true, but it has no relationship to it at all. I do not know of any ground that the defendants are 4239 entitled to this statement.

Mr. Keenan: How do I know that Major Radovich is not going to take the witness stand?

Mr. McGohey: There is not anything shown here that will indicate that the statement of September 6th is different or contradicts in any way the statement of March.

The Court: What is your position, Mr. Robb?

Mr. Robb: If the Court please, our position is that we cannot see how anything Major Radovich may or may not have told some third person has any bearing upon Mr. Keenan's clients' guilt or innocence?

Mr. McGohey: Your Honor, you have admitted the March statement——

The Court: Do you object?

Mr. Robb: Yes, sir.

Mr. McGohey: The March statement was admitted under a very careful instruction to the jury which your Honor said you would repeat in your charge, that it was to be considered only as against the de-
4241 fendant Radovich. There is no suggestion made here that there is any contradiction. As a matter of fact, insofar as there is any testimony of the question of the relationship of the September statement to the March statement, it is this: that they are identical.

The Court: The ruling of the Court is that the Court will not require the production of the paper.

Mr. Keenan: Will the record show an objection upon the part of the United States Attorney to produce them?

The Court: The objection on the part of the United States Attorney and an objection on the part of the defendant Radovich.

Mr. Keenan: We believe that we are entitled to produce in the defense of Samuel Bayer and Elias
4242 Bayer any relevant testimony that in any manner within the principle of reasonable proximity is conducive to their innocence, and that we believe that the statements contained—that if we want to, we have the right to introduce them as made by Radovich, just as much as the Government has; that if it would in any manner show the innocence of the defendants that these statements against interests do not belong alone to the Government, it belongs to any party in the lawsuit.

We believe that we are being deprived of our right to produce before this Court and jury relative and pertinent testimony that might even be determinative of the entire issue in the prosecution, and that a failure to do so prevents us from in turn presenting other evidence upon which such information would be based.

Mr. McGohey: I have this to say: I will ask that your Honor take the September statement and read it. I think may be your Honor has already read it.

The Court: I have, but I am not very familiar with it.

Mr. McGohey: I will submit the statement to the 4244
Court so that the Court may examine it to determine whether or not there is any contradiction between the statements, and if there be no contradiction, then to seal it as an exhibit in this trial so that it can be available for the appellate court on review if there be an appeal.

Mr. Robb: If the Court please, might I say here that we called upon Mr. McGohey at the time we were cross-examining the agent, Flynn, to produce the September statement, and Mr. McGohey refused to do it. I do not think this is a time to put this statement under seal and have it submitted to your Honor for some rather strange proceeding.

Mr. McGohey: It is not a strange proceeding.

Mr. Ansell: I furthermore think that it would lead, 4245
if I understand what is in the motion, to a trial of collateral matters, and prolong this trial and actually elucidate nothing.

Mr. Robb: If the Court please, our position is simply that we called upon Mr. McGohey at the time we thought was the proper time to produce that statement, and you refused to do it. Now, I do not think

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Mr. Keenan should be given that statement, perhaps to be used against our client. I do not know why he wants it. By the same token, I do not think it should be made available to your Honor under seal. We thought we were entitled to have it at the time we asked for it. Mr. McGohey did not give it to us. That was for a specific purpose.

Mr. McGohey: For what specific purpose?

Mr. Ansell: Even so, you are going to get into a long and almost interminable trial of collateral matters, and it will serve no useful purpose.

Mr. McGohey: I do not think it will take your

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Honor too long to read that statement.

The Court: I am going to take this situation under advisement and let us go ahead with something else.

Mr. Keenan: I would want to have this decided before I decide what else I want to go ahead with.

The Court: What about those other statements?

Mr. McGohey: There is a statement there from some man named Smith, I believe. I never heard of that statement before and I never saw it, and I have no copy of it.

The Court: What about the other one?

Mr. McGohey: The other one I have, or I have what purports to be a copy of that. I never saw the original. I cannot for the life of me see what relevance that would have, your Honor, here. It is not

4248

mine. I have a carbon copy. I think we have a carbon copy of it, but the other one I never saw, the Smith statement.

Mr. Wallace, you never saw that either, did you?

Mr. Wallace: No.

The Court: You say you have a copy of this second statement?

Mr. McGohey: Yes, sir, I have. On the same theory, there is no objection to either one of these.

except, your Honor, that I do not know the purpose of them. I cannot understand it. If it is claimed that they were going to contradict the statements that were put in, I am going to submit them to your Honor under the rule of the Krulewitch case and the Cohen case in this circuit.

The Court: I think I will let the jury go until 2 o'clock. The jury is excused until 2 o'clock.

(Jury retired from the courtroom.)

The Court: Let me have the statement referred to in paragraph 1, and anything you have pertaining to the statement referred to in paragraph 2. I understood you to say you had a copy of that? 4250

Mr. McGohey: Yes. May I get that, so that the record will show what I am giving to the Court?

The Court: Yes.

Mr. McGohey: I do not believe, your Honor, that there is any rule that anybody can just demand anything that they may think is in the possession of the Government unless there is some showing made or some reason——

The Court: They can demand all right.

Mr. McGohey: I mean, properly demand and get.

The Court: I did not say get. I say he can demand. This one is in evidence, is it not?

Mr. McGohey: This one is Exhibit 25.

The Court: Make yourselves at ease for a few moments. 4251

Mr. Keenan: May the record show that your Honor has been given the September statement, the March statement which is in evidence, and a typewritten paper which purports to be a statement of Major Radovich given to Colonel Snyder on the 14th of August, 1944.

The Court: All right.

4252

Gentlemen of counsel, I have not re-read the statement of March 15th which was introduced in evidence, because I had previously read it and heard it read in evidence and am familiar with its contents. I had already previously read the statement of September 6th and I have re-read that at this time, and I have read fully the carbon copy of the statement of the defendant Radovich to Colonel Snyder.

I am going to overrule the motion made of me that the United States Attorney be required to produce the documents which are not introduced, principally upon the basis of the fact that I have carefully ex-

4253

amined them, and I find no conflict in any matter of materiality in the two documents not admitted and the document which has been admitted, therefore I shall not require them to be produced.

I do think that the papers should be made a matter of record in the event that there should be a review of my decision.

Mr. McGohey: I suggest in that connection, your Honor, that you order them sealed and the sealed envelope marked as an exhibit. That practice has been followed in other cases in this Court.

The Court: All right, I will follow that suggestion and direct——

Mr. Ansell: That means they will not be spread upon the record?

4254

Mr. McGohey: No. They will be sealed and marked "Court's Exhibits".

The Court: They shall not go into the record in this case at all, but I do think it only fair that they be made available should anyone desire to review the ruling which has been made, which could not intelligently be made unless the papers were available.

Mr. McGohey: Do I understand your Honor to mean that they are to be made available to counsel for the defendants?

The Court: No, sir.

Mr. McGohey: Made available for the Court in the event of appeal?

The Court: Exactly.

Mr. McGohey: And may they be marked Court's Exhibits A, B and C?

The Court: They may be, but we haven't got a clerk here now to do it.

Mr. Ansell: Mark them exhibits in this case A, B and C.

Mr. McGohey: Mark them Court's Exhibits A, B and C and sealed.

The Court: This (indicating) was in. 4256

Mr. McGohey: I mean the two statements, A and B, Court's Exhibits A and B; and that they will then be sealed.

The Court: And available——

Mr. Keenan: The Court will grant us an exception to his Honor's ruling on that?

The Court: Yes, sir" (R. pp. 896 to 902, incl., fols. 2687 to 2795, incl.).

34. The Court erred in refusing to receive in evidence, on behalf of the defendants Bayer, a certain portion of HR 7528, passed by the United States Senate on October 24, 1942, to which the defendants Bayer duly and legally excepted (R. p. 903, fol. 2707) as follows:

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"Mr. Keenan: Can we say this, that the defendants Bayer offer that part of HR 7528, passed by the United States Senate on October 24, 1942, by a vote of 58 to 5, which was as follows:

'Section 7: No person under twenty years of age inducted under this Act shall be placed in actual combat duty beyond the territorial boundaries of

the Continental United States until after he has had at least one year's military training following his induction.'

From the Congressional Record of the 24th day of October, 1942, on page 8934.

This tender is not objected to by the United States Attorney because of the failure to present adequate formal proof, but is objected to on the ground of its claimed irrelevancy.

Mr. McGohey: The Government objects to it on the ground that it is irrelevant and immaterial.

The Court: Which objection the Court sustains.

4259 Mr. Keenan: And an exception is noted.

Mr. McGohey: May the record also show, your Honor, that this resoultion which was passed by the Senate never became law?

Mr. Keenan: It is so conceded.

The Court: Very well" (R. pp. 902, 903, fols. 2705 to 2708, incl.).

35. The Court erred in receiving in evidence Government's Exhibits 23 and 23(a), to which the defendants Bayer duly and legally objected (R. pp. 520, 521, fols. 1559, 1561) as follows:

"Mr. Wallace: I offer in evidence Government's Exhibits 23 and 23-A.

4260 Mr. Robb: We object, if your Honor please.

The Court: Is there objection, gentlemen?

Mr. Robb: Yes, sir, we object to it.

The Court: Let me see them, please, I will overrule the objection and admit the exhibits.

Mr. Robb: Exception, if your Honor please.

The Court: Very well.

Mr. Robb: Would your Honor like me to make a statement as to the grounds of my objection?

The Court: If you wish to.

Mr. Robb: There is no connection shown between that check and this case.

The Court: I assumed that would be your ground, but I will overrule the objection.

You wish to withdraw the original and leave the copy?

Mr. Wallace: That is correct, your Honor.

The Court: Well, in addition to that, I think it may be better to keep both in the court file for the present, and if you wish to do that later you may take it up with me.

Mr. Wallace: All right, your Honor. 4262

Mr. Keenan: Well, I think it can go back. We may want to ask some questions about it, but I think there can be a substitution.

The Court: I would prefer to have the original remain in the case for the present, and if you wish to withdraw it later I will entertain a motion. Have you any further questions for the Government?

Mr. Wallace: Yes, I have, your Honor. I wanted to read the exhibit to the jury at this time.

(Government's Exhibits 23 and 23-A for Identification received in evidence.)

Mr. Keenan: I object to it on the additional grounds, your Honor, that it can't be, if I understand the testimony correctly, can't be the check that was described 4263
by Captain Pepper, who was a Government witness, because if my memory serves me correctly he said he tore that check up.

The Court: The witness has testified it is not the original but it is the bank's duplicate and that the original has never been presented to the bank. That is what this gentleman has testified to, so the objection is overruled" (R. pp. 520, 521, fols. 1558 to 1562, incl.).

4264 *Assignment of Errors by Defendants Bayer.*

36. The Court erred in receiving in evidence Government's Exhibit 24, to which the defendants Bayer duly and legally objected and excepted (R. pp. 525, 526, 527, fols. 1575, 1578, 1581) as follows:

"Mr. Keenan: We object to it on behalf of the Bayers. Obviously, in the first place, the mere fact that if otherwise admissible it would be admitted in the manner and fashion approved under the statute quoted, it does not cure the vice of inadmissibility on other grounds, and it is obvious from the date that whatever happened the Radovich letter happened after he was under arrest, as we think the evidence
4265 has and will show, and that it took place not in furtherance of any conspiracy on its own face; and, secondly, after any alleged conspiracy had terminated.

The Court: What has the Government to say as to the last objection?

Mr. Wallace: On the question as to whether the alleged conspiracy has ended, it is the Government's position that it had not ended. As far as Radovich's participation in the conspiracy is concerned, the Government does not claim that this particular act was in furtherance of the conspiracy and is therefore not admissible against all of the defendants, but only as against the defendant Radovich.

The Court: Objection overruled. And the letter
4266 will be admitted as to Radovich, and I will so inform the jury.

Mr. Robb: Might I say one further thing, if your Honor please?

The Court: Yes.

Mr. Robb: In connection with the second ground of my objection, which was that we should have an opportunity to show the circumstances which induced or produced this letter by Radovich, we offer to prove,

if we are permitted, that he was induced to write this letter by promises and coercion held out and imposed upon him by the investigating officers at Mitchel Field, that that is why he wrote this letter which is now being offered in evidence.

Mr. Keenan: I want to add our objection. While I understand the Court will instruct the jury that it is not binding upon the defendant Bayer, nevertheless I think if it is improperly admitted even against Radovich, still it is to the Bayers' disadvantage, and I will add that to my objection.

The Court: What have you to say about the inducement and promises? 4268

Mr. McGohey: There is nothing in that letter to indicate that it was made on any promises.

Mr. Wallace: The letter itself appears to be in the handwriting of the defendant, the entire letter.

Mr. Keenan: Nobody has so stated.

Mr. Wallace: That is for the jury to determine. The jury has before them Exhibit 1, which contains the signature of Walter Radovich. The jury is in a position to determine whether or not that is the signature and writing of Walter Radovich. They ultimately must decide that fact.

Mr. Ansell: We want to press the objection, your Honor, that inasmuch as this serves the purpose of a confession, that this man Radovich was being subjected to investigation, that he was being promised 4269 that he would be let out if he did certain things, that he had been there unlawfully for a certain period of time, and we think that all of those circumstances, that question of inducement and coercion ought to be considered before it is admitted.

Mr. Wallace: The letter is in no sense a confession. It is the Government's position, your Honor—

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the letter is admitted. Exceptions noted.

(Marked Government's Exhibit 24.)" (R. pp. 525 to 527, incl., fols. 1575 to 1581, incl.)

37. The Court erred in ruling that there was no inducement offered as to render the statements of the defendants
4271 Bayer inadmissible, to which the defendants Bayer duly and legally excepted (fols. 1046, 1047).

38. The Court erred in ruling that it would permit the witness Gerald J. Flynn to testify as to statements made by the defendants Bayer in his presence, to which the defendants Bayer duly and legally excepted (fols. 1073, 1074, 1240, 1241).

39. The Court erred in sealing two statements made by the defendant Radovich, referred to as Court's Exhibits A and B, to which the defendants Bayer duly and legally excepted (R. p. 902, fol. 2705).

40. The Court erred in refusing the following request
4272 to charge:

"In this connection, I charge you, as a matter of law, that fraud is never presumed. On the contrary, the presumption in law is that parties, in their business relations, are prompted by honest motives, and this presumption is so well established in law that before you are justified in abandoning that theory of the conduct of the defendants in this case, you must

be satisfied, beyond a reasonable doubt, and not by mere conjecture or suspicion, that the defendants intentionally, wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent" (R. p. 1088, fol. 3262)

to which refusal to charge, as requested, the defendants duly and legally excepted (R. p. 1144, fols. 3431, 3432).

41. The Court erred in refusing the following request to charge:

"While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise" (R. p. 191, fols. 3272, 3273) 4274

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1144, fol. 3432).

42. The Court erred in refusing the following request to charge: 4275

"I charge you that in the opening statement in setting forth the Government's theory of the prosecution, the United States Attorney stated that evidence would be presented to you, that arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the Headquarters of the Base to the Head-

4276 quarters of the First Fighter Command, the Headquarters Squadron of which Major Radovich was the Commander; there is no evidence in the case to prove this statement made by the United States Attorney and, therefore, you will conclude that the Government has failed to prove that part of its case" (R. p. 1092, fols. 3275, 3276)

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1145, fol. 3433).

43. The Court erred in refusing the following request to charge:

4277 "I instruct you that the defendants are entitled to have this Court charge to you their theory of defense against the charges set forth in this indictment and I, therefore, charge you that the defendants Samuel Bayer and Elias Bayer assert as their defense that they at no time attempted to induce any officer of the United States to do any act in violation of the said officers' obligations and duties to the United States and that any gratuities other than sums of money were extended to any officers for no motive and without in any manner being a part of an agreement or plan or combination or conspiracy to induce any officer to in any manner be unfaithful to his obligations to the United States Government and that any payments
4278 of money made by him to the defendant Radovich were made involuntarily through coercion, expressed or implied, and I charge you that in the event that you do not find to the contrary, beyond a reasonable doubt, your verdict must be in favor of Samuel Bayer and Elias Bayer" (R. p. 1093, fols. 3277, 3278).

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3436, 3437).

44. The Court erred in refusing the following request to charge:

"I charge you that the uncontradicted evidence in this case, from government witnesses, establishes the fact that regulations require that the first three months of a man's service be devoted entirely to basic training. I charge you that the undisputed evidence in this case shows that neither of the two enlisted men, Bayer or Usdan, received more than two weeks' basic training and a failure to provide such basic training for the said enlisted men would constitute a violation of the Army regulations and, therefore, any officer who for any other purpose, prevents the shipment overseas of enlisted men, including Martin Bayer and Melvin Usdan, who did not receive the required amount of basic training, would not be found by you on such account to be unfaithful in the performance of his duties as such officer, nor would any agreement or plan or conspiracy to prevent such individuals from being shipped overseas or being retained in camp until such basic training had been received, as provided for by regulation, would not constitute defrauding the United States Government and would, therefore, not constitute the basis of an offense against the United States. (See testimony of Capt. Pepper, page 114, October, 4, 1945 and testimony of Melvin Usdan and testimony of Colonel Boebel.)" (R. pp. 1093, 1094, fols. 3278 to 3281, incl.), 4280 4281

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1145, fol. 3434).

45. The Court erred in refusing the following request to charge:

"I charge you that the theory of the defense is that the enlisted men, Martin Bayer and Melvin Usdan,

were not properly or adequately trained to justify their being shipped overseas. I charge you that the defense theory is that the two enlisted men were being shippd to a commando unit for which they were not properly trained and I charge you that the undisputed evidence in this case shows that to be a fact, and, therefore, any effort on the part of Samuel Bayer to prevent such action against his son and nephew, even by the payment of money, would not constitute defrauding the United States" (R. p. 1094, fol. 3281),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. pp. 1145, 1146, fols.
4283 3435, 3436).

46. The Court erred in refusing the following request to charge:

"I charge you that the evidence shows that the commando unit was a voluntary organization and that any payment of any money for the purpose of preventing the transfer of either enlisted man or both to said organization to which they had not consented to be transferred or any agreement to prevent such transfer without their consent, would not be in fraud of the United States and, therefore, if said transfers were made without the consent of said enlisted men or either of them and I charge you that all the evi-
4281 dence herein shows that they did not so consent, I therefore charge you that you cannot find that the government was defrauded by reason of their being transferred from Westover Field and in that respect you must find the defendants Bayer not guilty" (R. p. 1094, 1095, fols. 3281 to 3283, incl.),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. pp. 1145, 1146, fols. 3434, 3435).

47. The Court erred in refusing the following request to charge:

"You are instructed that the Government cannot be defrauded merely by transferring one soldier from one company or field to another at the request of any individual including such soldier's parents. If you find that if such transfer, if carried out, would not constitute a fraud against the United States Government, then you are instructed that any such agreement or concerted plan would not be in violation of the laws of the United States and your verdict herein must be one of not guilty for all of the defendants. If such agreement consisted of an understanding that 4286
the soldiers, Martin Bayer and Melvin Usdan, would receive the same treatment and consideration as any other soldier, in such event you would not find that the United States was defrauded and your verdict would therefore be not guilty as to all defendants.

You are instructed that before you can find the defendants or any of them guilty as charged in this indictment, you must find beyond a reasonable doubt that there was a conspiracy to defraud the United States and I further charge you that that of which the United States is intended in said agreement of conspiracy to be deprived of must be something of substance or value and cannot consist of some vague or fanciful or insignificant matter of no practical con- 4287
sideration and trivial in nature" (R. pp. 1103, 1104, fols. 3309, 3310, 3311),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3436, 3437).

4288 *Assignment of Errors by Defendants Bayer.*

48. The Court erred in refusing the following request to charge:

> "You are instructed that since this is a charge of conspiracy, the Government must prove to you beyond a reasonable doubt first, what the agreement of conspiracy was; secondly, by whom it was entered into; and third, in what manner and at what time; and if at the end of your deliberation, you are confused as to the claim of the Government in any of these respects to the extent that it is not clear to you beyond a reasonable doubt what the agreement the Government charges consists of, or by whom it was entered into
4289 or when, then, and in such event, it will be your duty to bring in a verdict of not guilty for all three defendants" (R. p. 1098, fol. 3294),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

49. The Court erred in refusing the following request to charge:

> "You are instructed that for you to convict the defendants, it is not sufficient for you to find even beyond a reasonable doubt that some agreement between the defendants did take place or that some conspiracy was entered into but that you must find that
4290 the conspiracy alleged by the Government in the indictment to have occurred and no other, and in the event that you are not liable to so find by clear and convincing proof, leaving you free from reasonable doubt on this subject, you must acquit all defendants" (R. p. 1099, fol. 3295),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

50. The Court erred in refusing the following request to charge:

> "You are instructed that the Government charges a conspiracy on the part of three persons, Samuel Bayer, Elias Bayer and Walter V. Radovich, and unless you do find that there was a conspiracy entered into between all three defendants named herein to defraud the United States Government in the manner and fashion alleged in the indictment, then you must bring in a verdict of acquittal for all three defendants" (R. p. 1099, fol. 3295),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437). 4292

51. The Court erred in refusing the following request to charge:

> "You are instructed that this indictment does not describe a devisable offense and that unless you find all three defendants to have engaged in this conspiracy and in the identical conspiracy described in the indictment, you must acquit all defendants" (R. p. 1099, fol. 3296),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

52. The Court erred in refusing the following request 4293
to charge:

> "I charge you that said statements contain many questions and answers which are totally immaterial to the issues in this prosecution; that there is no evidence against either of the Bayers that there was any misconduct on their part with reference to any uniforms ordered or purchased by the defendant Radovich from Mervin Levine; that there is no evidence

that either the Plymouth Thread and Yarn Company or Samuel Bayer or Elias Bayer paid any money therefor and I, therefore, instruct you to disregard this transaction entirely; that there is no evidence that the defendant Elias Bayer purchased anything for Radovich; that there is no evidence of any violation of the law on the part of Samuel Bayer or Elias Bayer in reference to any conduct with any person at any night club or wrongdoing in accompanying any officers named throughout this trial to any night club.

I charge you that there is no evidence that Elias Bayer had any knowledge or any participation in the
4295 alteration of any records.

I further charge you that you can disregard anything in the record concerning a Colonel Clarke or Colonel Dykemeyers or Lieutenant John Gimbel, Jr., or Ed. A. Martin or Charles Deninberg, all of whose names were used in questions propounded to Elias Bayer by Assistant United States Attorney Wallace without any evidence being introduced in this hearing to in any manner connect or concern any such individuals with any relevant matter in these proceedings and you are, therefore, instructed to disregard such questions and answers and the names of such individuals.

I charge you that you will likewise disregard any
4296 questions and answers of the Assistant United States Attorney Wallace concernnig Sergeant Gross, Colonel Johnson or Purden for like reasons" (R. pp. 1100, 1101, fols. 3299 to 3302, incl.),

to which refusal to charge as requested the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3437 to 3439, incl.).

53. The Court erred in refusing the following request to charge:

> "You are instructed that the Government attempted to introduce evidence through questions asked and answered by Elias Bayer about his purchasing insurance. I instruct you that the Government has offered no proof of any kind whatsoever in respect thereto, and by reason of such failure you will disregard any such questions or any such subject matter in this proceeding.
>
> You are further instructed that Elias Bayer was asked about various individuals including Feldman and Greenfield and that the Government has offered 4298 no proof of any matters concerned with such names and, therefore, you will entirely disregard any such questions and answers" (R. p. 1101, fols. 3301, 3302),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3437 to 3439).

54. The Court erred in refusing the following request to charge:

> "You are instructed that the Government has the burden of proof beyond a reasonable doubt of showing what the conspiracy consisted of and when it was entered into. Such conspiracies need not be entered into formally or in writing or by the employment of 4299 any particular phraseology but this does not relieve the Government from its obligation of proving to you clearly and unequivocally what the agreement was and between whom and by whom it was entered into. This obligation is the same as any other that the Government assumes in any criminal prosecution" (R. pp. 1104, 1105, fols. 3312, 3313),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

4300 *Assignment of Errors by Defendants Bayer.*

55. The Court erred in refusing the following request to charge:

> "I charge you that there is no evidence in this case that the transfers of Martin Bayer and Melvin Usdan from Westover Field to the Commando Unit at Goldsboro was effected in any manner other than that described by Samuel Bayer and Elias Bayer as far as said defendants Bayers are concerned and in considering the Government's charges against the said defendants Samuel and Elias Bayer in regard to such alleged conspiracy, you are obliged to accept their statements as true in this regard, in which event you
4301 will find that Samuel Bayer was the victim of extortion and that his action in regard to the payment of $5,000 to Radovich would not justify your returning a verdict of guilty against him" (R. p. 1108, fols. 3322, 3323),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3442).

56. The Court erred in refusing the following request to charge:

> "You are instructed that no statement made by the defendant Radovich can in any manner or fashion be considered by you in arriving at a conclusion of guilt
4302 on the part of Samuel Bayer and if you are not able to carefully and clearly beyond a reasonable doubt separate in your mind such testimony from any other testimony in this case so that your mind remains unconfused on this subject, you must return a verdict of not guilty as to the defendant Samuel Bayer" (R. p. 1101),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

57. The Court erred in refusing the following request to charge:

"I charge you that you have had read to you Exhibits 19 and 22, inclusive, containing a long statement purported to have been made by Elias Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Samuel Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Samuel Bayer from those contained in the said statement so that your 4304
mind does not remain free from reasonable doubt as to from what source evidence considered by you as to the guilt or innocence of Samuel Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to do so that you are in no manner or fashion influenced in your conclusion by said statements which I have charged you already are not binding upon Samuel Bayer, then and in that event you must bring in a verdict of not guilty for Samuel Bayer" (R. pp. 1101, 1102),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fols. 3303, 3304, 3305). 4305

58. The Court erred in refusing the following request to charge:

"I charge you that you have had read to you Exhibits 8 to 18, inclusive, containing a long statement purported to have been made by Samuel Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no state-

ment therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Elias Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Elias Bayer from those contained in the said statement so that your mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Elias Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to so do so that you are in no manner or fashion influenced
4307 in your conclusion by said statements which I have charged you already are not binding upon Elias Bayer, then and in that event you must bring in a verdict of not guilty for Elias Bayer" (R. p. 1102, fols. 3205, 3206),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

59. The Court erred in refusing the following request to charge:

"You are instructed that it is particularly important in a case of this nature to keep clear in your mind who made the alleged admissions contended for by the Government. You have had read to you three
4308 statements. None of these statements may in any manner or fashion influence you in determining the guilt of any of the three defendants other than the single defendant whom you find beyond a reasonable doubt to have made the statement you are considering, and it is particularly important that you keep free from confusion on this vital matter and if upon a careful and matured consideration of all of the evidence you are not free from a reasonable doubt

that there has been confusion in your mind as to which of the three defendants made the admission concerning the fact under consideration, then and in such event I charge you that you will have such a doubt as will require you to return a verdict of not guilty as to such defendant" (R. p. 1103, fols. 3307, 3308),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

60. The Court erred in refusing to include the following in the request to charge:

"• • • If the jury finds that the facts establish that the defendants Bayer made various gifts to the defendant Radovich for the purpose of obtaining his conscientious, faithful, disinterested and unbiased service and judgment in determining whether to transfer Martin Bayer and Melvin Usdan, both soldiers in the United States Army, from units stationed in continental United States to units about to be sent out of the continental United States, then the defendants Bayer must be acquitted. 4310

If the jury finds that the defendants made various gifts to the defendant Radovich to have the said defendant Radovich perform his lawful duty, then the defendants Bayer must be acquitted.

If you find from the facts that the defendants Bayer made the gifts without the intent to defraud the United States but to obtain the disinterested and unbiased judgment of officers of the United States Army free from corruption, partiality, improper influence, bias, dishonesty and fraud, then you must acquit the defendants Bayer" (R. pp. 1109, 1110). 4311

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fols. 3443, 3444).

4312 *Assignment of Errors by Defendants Bayer.*

61. The Court erred in refusing to include the following in the requests to charge:

> "* * * The fact that the defendants Bayer cannot call or compel the defendant Radovich to testify is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of said defendants Bayer" (R. p. 1110, fol. 3329),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3444).

62. The Court erred in refusing the following request to charge:

4313

> "Mr. Keenan: 'The greatest danger to justice from a jury is through the confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural in time of war, when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the Court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations which must be constantly borne in mind or the verdicts of juries in such
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> 4314
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> cases will mistakenly become expressions of their hatred for unpatriotic acts in general instead of their careful judgment on the facts shown by the evidence in a particular case. Patriotism must not become even innocently a cloak for injustice. The right of an accused in the Courts of this nation to a fair trial must not vary with the character of the crime. The variation permitted is in the punishment but that comes only after a fair trial'" (quoted from Wolf v.

United States (C. C. A., 8th Cir.), 259 Fed. Rep. 388, 394) (R. pp. 1151, 1152, fols. 3452, 3453, 3454),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1152, fols. 3454, 3455).

63. The Court erred in instructing the jury as follows:

"Certain witnesses have testified that the defendants Bayer bore a good reputation in business and in their home communities. Also, you have heard certain citations awarded to the defendant Radovich which you may, if you wish, consider as evidence of good character. 4316

In your consideration of the cases of each defendant you may consider this testimony and attach to it such weight as you think proper. You should consider such evidence along with all the other evidence in the case, and if considered along with all the other facts and circumstances of the case such evidence should raise in your minds a reasonable doubt of the guilt of any defendant, you should find such defendant not guilty. However, the fact that a person bears a good reputation is no justification for the commission of crime, and if you are satisfied beyond a reasonable doubt that any defendant is guilty, then the fact that such defendant bears a good reputation or has been awarded citations would be no reason or 4317 excuse whatever for a finding of not guilty as to such defendant" (R. p. 1132, fols. 3395, 3396, 3397),

to which portion of the Court's charge the defendants Bayer duly and legally excepted (R. p. 1147, fols. 3439, 3440).

4318 *Assignment of Errors by Defendants Bayer.*

64. The Court erred in instructing the jury as follows:

"• • • • These statements, considered alone, do not constitute sufficient evidence of the existence of a conspiracy, but if you are satisfied beyond a reasonable doubt from the other evidence in the case that a conspiracy between any two of the defendants did exist, then you may consider the statement of each defendant in your consideration of whether or not that defendant was a party to the conspiracy" (R. p. 1140, fols. 3419, 3420),

to which portion of the Court's charge the defendants
4319 Bayer duly and legally excepted (R. p. 1150, fol. 3448).

65. The Court erred in having re-read to the jury its charge relating to the elements of conspiracy without re-reading the balance of the charge (R. pp. 1156 to 1162, incl.), to which re-reading of said portion of the charge the defendants Bayer duly and legally excepted (R. p. 1165).

66. The Court erred in refusing to state to the jury that the records with regard to the telephone call of November 24, 1943 had been in the Government's possession, to which the defendants Bayer duly and legally excepted (R. p. 1128, fol. 3384) as follows:

4320 "Mr. Keenan: We claim in our defense that we got a telephone call from Major Radovich from Washington in the morning, and that is shown, and also it is some evidence in my opinion of the unlikelihood of Radovich being in Goldsboro that day. It would be conclusive. But I also would like to have the Government produce its record as to the movements of Major Radovich on that day because I feel certain that they do have that information.

Mr. Wallace: We have no such record.

The Court: The Government has stated that it has no such record.

Now, Mr. Keenan, do you wish me to state to the jury what I said I would state to them?

Mr. Keenan: Yes, I do, and that you would state that you are making that at our request.

The Court: All right, sir.

Mr. Robb: Do I understand that you are going to tell the jury that the records don't show who called, either way?

The Court: Yes, sir. You only wish me to mention the collect call?

4322

Mr. Keenan: Yes.

Mr. McGohey: I think both calls ought to be stated.

Mr. Robb: If your Honor does not mention them both, we object.

Mr. Keenan: But it is not probative of any of the issues in this case.

Mr. McGohey: I think it is.

Mr. Keenan: I don't know, but there is no claim made for it.

Mr. McGohey: You claim——

Mr. Keenan: There is no claim that the call was or was not made or that anything—the Government makes no claim with reference to any call to Washington on that day, but we do make a claim that there was a call from Washington to us and we think it would be confusing to the jury to put anything other than the collect call that we received.

4323

Mr. McGohey: I think that we ought to have both calls, and I think that the Court should state that those two calls appear on a bill for the period stated, totalling one hundred seventy some odd dollars for out-of-town calls to various places.

The Court: What would be the materiality of the amount of the bill?

Mr. Keenan: I think, your Honor, that when that is read it ought to be stated that the Government has claimed that no such call took place.

Mr. McGohey: Oh, no.

Mr. Wallace: We never made any such claim.

Mr. Keenan: That is the——

Mr. McGohey: The Government never made any such claim and there is nothing in the record to substantiate that statement.

Mr. Ansell: I possibly do not understand the relevancy of this statement, but, of course, if any statement of fact is to go into the record, and if it is a circumstance that might operate to the disadvantage of Major Radovich, why, of course, we become interested at that moment. I probably have not been able to follow——

4325

Mr. Keenan: Might it be stated that these records have been in the possession of the Government by subpoena for more than a year ago, and not in the possession of the defendants Bayer or the Plymouth Thread Company?

The Court: In the absence of any showing that they have been denied to you, I don't think that would be material. It might create an inference——

Mr. Keenan: They had our records, they subpoenaed them, kept them, and never returned them.

4326

The Court: I am not going into that.

Mr. Keenan: I want to except to the failure of the Court to mention that" (R. pp. 1126 to 1128, incl., fols. 3378 to 3384, incl.).

67. The Trial Court erred in refusing permission to the defendants Bayer to place in evidence the slip of the telephone company showing that a "collect" call was made

by Radovich from Arlington, Virginia, to the office of defendants Bayer at Chelsea 3-2872 in New York City on November 24, 1943, and further in denying the motion of the defendants Bayer for a new trial after refusing to receive the slip in evidence or the withdrawal of a juror and for a mistrial, to all of which exception was duly taken (R. p. 1173, fol. 3519), this being the telephone slip which Mr. Cohen, associate counsel for defendants Bayer, produced and concerning which there was discussion with the Court and the District Attorney as follows:

"Mr. Cohen: Your Honor will recall that after the jury first was sent out by you, at the request of Mr. 4328
Keenan they were recalled and you spoke to them about the telephone calls, and you stated to them that while there was evidence that a telephone call was made to Washington and one came in from Washington, there was no evidence as to who made the call from Washington. Your Honor will recall that.

The Court: I recall saying that there was no evidence on the record.

Mr. Cohen: Yes. Now, since that time, of course, we were unable to get the evidence together because we did not know that Mr. McGohey was going to make a point of it on the trial, and he made it only in his summation, we have gotten the record of the telephone company, showing that the call from Washington to New York was made by Captain Radovich. 4329
And we ask for leave to put in that evidence in the light of Mr. McGohey's statement to the jury and in view, further, of the statement made by the jury to your Honor for further information concerning those dates. This is highly important and of great importance to the defendants here.

The Court: What is that you have in your hand?

Mr. Cohen: This is the telephone company slip which we only got after the matter was submitted to the jury. I think it is highly important in view of the statements made by the jury to your Honor.

The Court: Have you seen this, Mr. McGohey?

Mr. McGohey: No, I have not, your Honor.

Mr. Robb: We haven't either.

Mr. Ansell: Would your Honor hear us one moment, please?

The Court: Yes.

Mr. Ansell: We think the whole idea of putting evidence in the record by the method pursued this
4331 morning is irregular and prejudicial to the defendant Radovich, and we think to go further with it by means of stipulation between the United States and Mr. Keenan's clients would be highly prejudicial to Radovich and could not be done by stipulation, and would involve the opening up of that question and permitting us to cross-examine upon everything that is brought out. We don't believe, your Honor, that there should be an injection of facts into this record in any such way.

Mr. Cohen: Evidently, your Honor——

The Court: I want to hear from the Government first.

Mr. McGohey: Your Honor, may I see that? Have
4332 we got those telephone calls that were in here this morning?

The Court: I gave them back to Mr. Flynn or Mr. Wallace this morning.

Mr. McGohey: Because it is my recollection that there was an Arlington call, and that is what this appears to be as distinguished from Washington.

Mr. Cohen: Arlington is Washington.

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Mr. McGohey: We talked this morning about two calls, one from Washington and one to Washington.

The Court: That is right.

Mr. McGohey: Until I see the records, I don't know whether that is so or not.

The Court: I do recall very distinctly that the record which was produced this morning, that is, the telephone bill, referred to the two calls, New York to Washington and Washington to New York, a collect call from Washington, Col. parenthesis New York.

Mr. McGohey: Your Honor, but this is not Washington. This says on its face, Arlington, Virginia, and that undoubtedly is the way that would be reported on a telephone company bill. 4334

Mr. Cohen: No, it would not.

Mr. McGohey: Well, wait until we see, when the bill comes in. That is the first point. The second point, your Honor, is that I don't understand on this argument that they didn't have any time to get it. They had three weeks since this trial started and they certainly had the time since Miss Goertz testified about the dates to get it. And the evidence that Miss Goertz gave, and the argument that I made from that, your Honor, isn't going to be disproved by this or any part of it at all. All this is going to prove is that a telephone call was made from Washington. It is not going to prove that Radovich didn't make that telephone call from Goldsboro, and it is not going to prove that Radovich didn't on that day, the 24th, ask to have those orders made. It is not going to disprove that on the 25th the letter was sent from the Army Air Forces in Washington to Seymour Johnson Field to have the boys transferred out. It is entirely collateral, and certainly at this time, when the jury has 4335

been considering the case now since 11 o'clock, I certainly don't think there is any justification for opening the case to go into such a collateral matter, and I will oppose it.

Mr. Cohen: Evidently the matter is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6, and the matter—the whole thing was engendered by Mr. McGohey's argument in his summation before the jury.

Mr. McGohey: Based on the evidence, of course, your Honor.

Mr. Cohen: But you raised the point, on the question of doubt, as to whether or not this thing took 4337
place at all. There never was any question up to that time.

Mr. McGohey: That doesn't——

Mr. Cohen: Evidently it created a doubt in the minds of the jury.

Mr. McGohey: This evidence would not disprove it because all this evidence would show that he made a call from Arlington, Virginia, to New York, some time that day.

The Court: Gentlemen, I am not going to admit the evidence for a number of reasons. In the first place, there is no witness called to prove anything. In the second place, this memorandum refers to an Arlington call; a call about which I made a statement this morn- 4338
ing was a Washington call. I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive.

Mr. Cohen: But——

The Court: Sir, I have ruled, and I am just explaining. But the most cogent reason in my mind is that the case has long since been closed. As Gen-

eral Ansell very aptly remarked, my procedure at the beginning of this morning was irregular, to say the least, and I am not going to make it more irregular by calling in the jury at twenty-five minutes to five, when they have been considering the case since approximately 11 o'clock, and made some statements by way of evidence to them, or permit the statement of counsel, or the handing to them of an unverified memorandum from the telephone company. In my opinion, to inject any evidence or bit of evidence at this time would unduly emphasize it and give other counsel the right to put in other evidence, and call for somebody to cross-examine, and I just am not going to permit 4340
that.

Mr. Cohen: May I with all due respect, then, besides taking my exception to your Honor's ruling, now make a motion for the withdrawal of a juror and for the declaration of a mistrial and for a new trial on this evidence which we have found since the close of the trial or submission to the jury, and which we were unable to obtain prior to the opening of this trial?

The Court: Very well. The motion will be overruled.

Mr. Cohen: Exception" (R. pp. 1170 to 1173, incl., fols. 3508 to 3519, incl.).

4341

68. The charge of the Court to the jury is argumentative and unfair and was biased in favor of the prosecution.

WHEREFORE, the defendants Samuel Bayer and Elias Bayer pray that the judgment of conviction and sentence herein be, in all respects, reversed, and that such other and

4342 *Assignment of Errors by Defendants Bayer.*

further relief be granted as may be deemed just and proper.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Defendant Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant Elias Bayer.

CHARLES H. TUTTLE
and
4343 MAURICE I. WORMSER,
Of Counsel with Archibald Palmer
and Max E. Sanders.

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4345

**Assignment of Errors by Defendant Walter V. Radovich.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE UNITED STATES<br>v.<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH. | Criminal No. 120-468 |

The defendant Walter V. Radovich alleges that the following errors have intervened to his prejudice and he presents the following assignment of errors: 4346

1. The District Court erred to the prejudice of the defendant in sustaining the demurrer interposed by the Government to the plea in bar filed by the defendant. The defendant duly excepted to such ruling of the Court as follows (at folio 254):

> (The Court): It is therefore my conclusion to sustain the Government's demurrer to the plea or former double jeopardy filed by defendant Radovich.
>
> Mr. Ansell: I assume we may have an exception to that, sir?
>
> The Court: Exception may be noted. 4347

2. The District Court erred to the prejudice of the defendant in overruling the motion of the defendant at the close of the Government's case, to direct a verdict in his favor by reason of his plea in bar. The defendant duly excepted to such ruling of the Court as follows (at folio 2081):

Mr. Ansell: If your Honor please, at his time at the close of the Government's case I wish to renew defendant Radovich's plea in bar on the ground if the prosecution has proved anything here, assuming that it has proved something, it is either a conspiracy to bribe or bribery. Without entering into any argument, because I could add nothing to that, I would say to your Honor that it is my view that such was the charge before the court martial of which this accused was convicted.

The Court: All right, sir. I would take it that the effect of what you said is a motion for a directed verdict by reason of the plea in bar.

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Mr. Ansell: If it is not technically that, your Honor, as to which I have some doubt, I will couple with it a motion for a directed verdict at this time. That, it seems to me, would be the proper procedure covering all the rights which I hope to save here.

The Court: I should think that would be the proper procedure.

Mr. Ansell: I thought myself, without knowing that I had better protect my rights here by making a formal renewal of the plea in bar, but I think your Honor's suggestion is quite correct and I couple with it, therefore, a motion for a directed verdict. Your Honor has heard all the evidence and he is familiar with this case and I do not care to consume time in the

4350

argument.

The Court: All right. The motion will be overruled and an exception may be noted.

3. The District Court erred to the prejudice of the defendant in overruling the motion of the defendant, made at the close of all of the evidence, to direct a verdict in his favor upon the ground that the evidence revealed that the defendant had been tried twice for the same offense.

The proceedings in this respect were as follows (at folio 2845):

Mr. Robb: The defendant Radovich renews the motions made at the close of the Government's case to dismiss the case and to direct a verdict in his favor upon the ground of the insufficiency of the evidence and upon the ground that the evidence now reveals that the defendant Radovich has been tried twice for the same offense.

* * * * * *

The Court: Motions of the defendant Radovich by counsel are overruled. 4352

4. The District Court erred to the prejudice of the defendant in admitting in evidence against the defendant, over his objection and exception, Government's Exhibit 25, a written statement allegedly made by the defendant to Special Agent Gerald J. Flynn. Government's Exhibit 25 was in the words and figures following (at folio 3916):

March 15th, 1945
New York, N. Y.

I, Major Walter V. Radovich, Air Corps Serial number 0-416891 make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have identified themselves to me and whom I know to be Special Agents of the Federal Bureau of Investigation. I make this statement of my own volition. No threats of force, promise of favors or duress of any type has been offered to me to induce me to make this statement and I know that anything I say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so. 4353

Some time about April, 1943 I was introduced to Elias Bayer by a Lt. Roser. The introduction took place in the apartment of Elias Bayer which was located on Central Park So. At this time I was (end of p. 1) Hq. Squadron Commander of the First Fighter Command stationed at Mitchel Field. About a week later Col. Felix Vidal, Lt. Col. Alfred H. Jacobson, Lt. Ferdinand D. Roeser and I went to the I. Buss Uniform Co. where we were introduced by Elias Bayer. Major Englehardt was also with us at this time. Englehardt and I were fitted for uniforms. I recall that at the time we were unable to obtain a
4355 definite price on th uniforms. The other officers had apparently been th e before inasmuch as their uniforms were already being tailored.

After leaving I. Buss Uniform Co. we went to the office of the Plymouth Thread & Yarn Co. where I was introduced to Sam Bayer and where we were treated to several drinks. I became very friendly with Sam Bayer and saw him on numerous occasions (end of p. 2) after this. Sam Bayer took my wife and myself to dinner at the Waldorf Astoria Hotel. His wife Blanche Bayer and his secretary were with us at the time. Sam introduced me to the headwaiter and gave me permission to sign his name to the checks at the Waldorf Astoria whenever I wanted to go there. I never made use of this privilege. I recall that my
4356 wife wanted a piece of the silverware as a souvenir and that Sam Bayer called the waiter and ordered a full set which he gave to my wife.

Sam Bayer's son Martin Bayer and his nephew, Melvin Usdan were in my organization at Mitchel Field. They had been transferred to my organization at the request of Lt. Col. Jacobson before I had been introduced to Sam Bayer. Sam often spoke to me

about the boys and on many occasions asked me (end of p. 3) to assign them to special jobs such as moving them to the "line" from the file room. I refused to do this and told him that I intended to leave them where they were.

Some time during July, 1943 I received a phone call at Mitchel Field from Sam Bayer. He asked me to meet him at his office at 30 W. 21st St., N. Y. C. I did so. Sam asked me why his boys (Martin Bayer and Melvin Usdan) had to be transferred from Mitchel Field. I told Sam Bayer that the boys had to go because I had learned that they had been held at Mitchel Field because he, Sam Bayer had furnished 4358 entertainment and had given gifts and uniforms to different officers at the field. I told him that a Lt. Pepper knew the names of the officers who had received uniforms and where the uniforms were purchased. I told him that I would have nothing (end of p. 4) to do with any arrangement of this nature. Sam said "What's the difference, the boys don't ask for any special favors". I told Sam that the boys had to go and that I intended to ship them out. He asked me to wait for a week before doing anything and I agreed to do so.

Prior to the above conversation with Sam Bayer I had refused to accept the uniform which had been made for me at the I. Buss Uniform Co. When I refused to accept the uniform because it did not fit 4359 properly Phil Busch asked me what I was kicking about and told me that I was not going to have to pay for the uniform. About his time Sam Bayer sent Elias Bayer and myself to Rogers Peet at 5th Ave. and 41st St. and told Elias to buy me an officer's cap. Elias bought me a summer peak cap. I believe the cap cost about twelve and one half (end of p. 5) dollars.

I recall telling Sam Bayer that I had refused to accept the uniform which had been made at the I. Buss Uniform Co. Sam Bayer told me that he did not blame me for refusing to take the uniform, and said that he did not intend to pay I. Buss for the uniform as long as I had not taken it. He sent me down with Elias Bayer to the shop of Mervin Levine & Co. where I was fitted for two uniforms. My adjutant Lt. Irving Zarowsky was with us at the time and he also was fitted for a uniform. Eljas Bayer told Mervin Levine, "These are two friends of mine; I want you to fix them up with uniforms and do a good job." Although
4361 I understood that a deposit was required to the best of my recollection no money was paid for the uniforms that day. I returned for several fitings as I had ordered both (end of p. 6) a winter and a summer uniform. A short time later I stopped in to see Sam Bayer at his office. He asked me if I was going to pick up my uniform and when I told him that I was he gave me the money to pay for both my uniform and that of Lt. Zarowsky. I don't remember the amount of money which Sam Bayer gave me that day but I do recall that he knew what the uniforms would cost and that he gave me the exact amount of money. I picked up the summer uniform and paid Mervin Levine the money which I had received from Sam Bayer. I never returned to pick up the winter uniform.

4362 About a week after I had told Sam Bayer that I intended to transfer the boys, I met him in his office. He told me that he had made arrangements with an adjutant at the Base Hospital, by the name of Fabbricatore and a "full chicken" colonel (end of p. 7) of the First Air Force to have the boys transferred to the medical corps at Mitchel Field. He told me that he had made this contact with the "full chicken"

colonel through an insurance agent whom he either knew or had done business with. He said he had been obliged to purchase a $50,000 insurance policy in order to make the above contact. I asked Sam Bayer to tell me the name of the colonel but he said he would rather not do this. Sam Bayer then told me that he would give me $2,500 for each of the boys if I would approve the transfer of the boys to the Medical Corps. He told me that the transfers would mean a lot to him and that he made a lot of money and that money did not mean anything to him. I told Sam that I would approve the transfers but that I could not guarantee the results. I recall that at this meeting he spoke to me about my desire to go overseas (end of p. 8) and told me that he thought I was very foolish.

Shortly affer the above meeting with Sam Bayer, the transfer requests of Pvt. Martin Bayer and Pvt. Melvin Usdan came across my desk and I approved them.

Thereafter Sam Bayer and I were in frequent contact with each other. At times he was very emotionally upset and would cry and kiss my hand and tell me that I did not realize what a good thing I was doing for him. He told me that he had worried so much about the boys being sent overseas that he had suffered a heart attack and had been forced to go to a sanitarium. Upon these occasions his secretary Anne Solomon would usually comfort him. Anne Solomon often expressed great concern as to whether the transfers would be approved and expressed fear that the boys might be stuck. She told me that they were counting on me (end of p. 9) and that I was the only one who could help them.

About July, 1943 a short time after I had approved the transfers of the boys Sam Bayer gave me a roll of bills containing about $800.00. I recall that we

were riding in a cab at the time. About four days later I met Sam Bayer in front of Radio City. We both sat in my car and he gave me another roll of bills containing about $700.00. He asked me if there was a chance of anything going wrong. I told him that the matter was out of my hands. About a day or so later I met Sam Bayer in the Hotel St. Moritz. He gave me another wad of bills amounting to about $450.00.

A short time later Sam Bayer called me up and told me that something had gone wrong, that the boys had been shipped to Westover and Bradley Field. I
4367 told him that I knew nothing about it and had nothing to do with those transfers. I (end of p. 10) offered to return the money to him but he refused.

About September, 1943 I met Sam Bayer and had breakfast with him on a Sunday morning. He asked me if there was any way I could have the boys transferred out of Westover and Bradley Fields or if I knew anyone who could arrange this. I told him I would look into the matter. When I returned to Mitchel Field I spoke to Capt. Jack Pepper and asked him what he could do to arrange a transfer for the boys. He told me he would look into the matter.

During this time I had been transferred to the First Air Commando Unit which was scheduled for immediate
4368 overseas duty. I decided to transfer the boys to my outfit and then to transfer them out as "overstrength" before our unit went overseas. I completed all the necessary arrangements and asked Capt. Pepper if he would keep an eye on (end of p. 11) things to see that everything went according to schedule. I told him that I would give him $500.00.

About Oct. 1943 I called Sam Bayer from Washington, D. C. and told him that everything was arranged.

He agreed to have Elias Bayer meet me at Goldsboro, North Carolina, about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers. The extra $1,000 was for "other people" whom I told Sam Bayer I had to work with. By "other people" I mean Pepper. Before I left New York I gave the name of Capt. Pepper to Anne Solomon in order that she could contact him if anything went wrong.

On about the 27th or 28th of November, 1943 I met Elias Bayer and a man whom Elias introduced to me as the older brother of Pvt. Melvin Usdan who had 4870
come along (end of p. 12) because Pvt. Usdan's father was dead. This man asked me if I was sure that everything would be "OK" and appeared greatly concerned less the plan slip up. Elias Bayer gave me a white envelope containing $5,000. They also gave me three bottles of bourbon whiskey. The orders transferring the boys had already gone through.

I left Elias Bayer and the older brother of Pvt. Usdan at the railroad station. Elias told me that they intended to catch a train for the south.

I recall that the last time I had seen Sam Bayer in New York, he had cautioned me against displaying the money and that he said "the F. B. I. is looking for things like this".

About December 5th, 1943 while at Morrison Field, 4871
West Palm Beach, Fla., I purchased a cashier's check for $500.00 at the First National Bank to the order (end of p. 13) of Capt. Jack K. Pepper. I put this in an envelope and mailed it to Pepper at Mitchel Field. I did not enclose a note because I knew that all the mail was being censored.

I have read the above statement consisting of thirteen pages and this page and it is true.

WALTER V. RADOVICH

March 17, 1945

Witnesses:

E. J. McCABE & GERALD J. FLYNN, Special Agents, F. B. I., N. Y. C., 3/17/45.

The defendant duly excepted to the ruling of the Court in this respect, as follows (at folio 1976):

The Court: So the ruling of the Court is to overrule
4373 the objection of the defendants and admit the statement.

Mr. Robb: May we have exceptions, if your Honor please?

The Court: You may.

5. The District Court erred to the prejudice of the defendant in instructing the jury that the Court had ruled as a matter of law that the written statement made by the defendant to Special Agent Gerald J. Flynn was voluntary, and that the jury might consider the circumstances surrounding the making of such statement only for the purpose of determining whether or not the statement was true. The Court's charge in this respect was as follows (at folio 3420):

4374

Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.

I have also admitted for your consideration testimony in regard to the circumstances existing at the time

and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such baring as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evi- 4376
dence in the case.

The defendant duly excepted to the Court's charge in this respect as follows (at folio 3427):

Mr. Robb: We respectfully except to your Honor's statement to the jury that your Honor held as a matter of law that the statement made by defendant Radovich to Agent Flynn was not coerced. We respectfully submit that that is a question which should now be decided by the jury and they should not be told that your Honor has decided that question.

And, in that connection, we respectfully except to your Honor's failure to give prayer No. 6 and 6-A, requested by the defendant Radovich. 4377

We further except in that connection to your Honor's statement to the jury that their only function is to determined whether or not the statement, if any made, by the defendant Radovich, was true. We respectfully suggest that they should also determine whether or not it was coerced, and if it was in any degree coerced, whether it was true or not, they should reject it.

* * * * * *

At folio 3431:

The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

6. The District Court erred to the prejudice of the defendant in refusing to charge the jury as requested by the defendant in his Prayer No. 6 and Prayer No. 6-A. Such prayers were as follows (at folio 3338):

Defendant Radovich's Prayer No. 6.

4379 You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

Defendant Radovich's Prayer No. 6-A.

You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise 4380 or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

4381

The defendant duly excepted to the Court's refusal to charge as requested, as follows (at folio 3427):

> Mr. Robb: • • • we respectfully except to your Honor's failure to give prayer No. 6 and 6-A requested by the defendant Radovich.
>
> • • • • • •

At folio 3431:

> The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

4382

7. The District Court erred to the prejudice of the defendant in admitting in evidence against the defendant, over his objection and exception, a paper marked "Government's Exhibit 24", which was in the words and figures following (at folio 3914):

> Dear Sir
>
> I am writing to inquire as to the necessary steps that I should take to obtain $500.00 which I gave your bank for a cashier's check on Dec. 6, 1943.
>
> It was made out to a Capt. Jack Pepper and the check No. is #49896—the reason for the claim is that the check was destroyed and never cashed.
>
> Will you kindly inform me as to the procedure by the 1st of Sept.

4383

> Thank you
>
> WALTER RADOVICH
>
> Address
> Major Walter Radovich
> Ward 15
> New Cantonement Hospital
> Mitchel Field, N. Y.

The defendant duly excepted to the ruling of the Court in this respect, as follows (at folio 1580):

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the letter is admitted. Exceptions noted. (Marked "Government's Exhibit 24".)

8. The District Court erred to the prejudice of the
4385 defendant in refusing to require the United States Attorney to make available to the defendant and his counsel a written statement, in the possession of the United States Attorney, which had been made by the defendant to Special Agent Gerald J. Flynn in September, 1945. This statement was thereafter marked for identification "Court's Exhibit A" and sealed (folios 2704, 2705, 2706). The defendant duly excepted to this ruling of the Court as follows (at folio 1652):

Q. [Mr. Robb] Now, Mr. Flynn, getting back for a moment to your interview with the major on March 15th, you told us you read his statement which he had made in the hospital in September; did you read it aloud? A. I don't recall whether I read it aloud.
4386 I recall that I read it and that I gave it to Major Radovich, and that he read it.

Q. You read it first? A. Well, I can't be positive whether I read it first or whether he read it.

Q. How many pages were in that statement?

Mr. McGohey: Pardon me. Which statement?

Q. The statement that you had taken in September and which you read. A. Maybe five or six.

Q. Did you have a copy of it with you? A. No.
Q. Is there a copy here? A. I don't know.

Mr. Robb: Mr. McGohey, do you have a copy?

Mr. McGohey: Yes, I have.

Mr. Robb: May I have it, sir?

Mr. McGohey: It is in the office. I answered the question that I have it. That is true. I have possession of that statement, your Honor, but I certainly am going to resist producing it now unless directed, because I am not offering that statement in evidence.

The Court: I will not require you to produce it.

Mr. Robb: If the Court please, may we formally 4388
ask the Court to require Mr. McGohey to produce it, and take an exception to your Hon[illegible]'s ruling?

The Court: Very well.

At folio 2040:

Q. [Mr. Robb] By the way, do you have that statement that you took from Major Radovich in the hospital? A. No, sir.

Q. Where is it? A. I think Mr. McGohey has that statement.

Mr. Robb: May I see it, Mr. McGohey? That is the statement I asked Mr. McGohey to give me the other day and I did not get it from him. 4389

Mr. McGohey: I object to all this speech before the jury. The statement has not been offered by the Government. All this examination goes to the statement of March 19th or March 15th, which is in evidence, and I again make my objection to the line of examination.

The Court: What is your position?

4390 *Assignment of Errors by Defendant Radovich.*

Mr. Robb: Well, if the Court pleases, I think it is perfectly obvious, if the two statements are tied up together——

The Court: I am merely asking you what your position is and what you are asking for?

Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

4391 The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception?

The Court: Yes.

Wherefore the defendant Walter V. Radovich respectfully prays that the judgment herein be reversed and the sentence imposed upon him be set aside and that he have such other and further relief as may be proper.

4392

WALTER V. RADOVICH,
By: SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for Defendant
Walter V. Radovich,
Tower Building,
Washington, D. C.

4393

## Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
Defendants-Appellants.

4394

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled cause, as agreed on by the parties.

Dated, New York, April 15, 1946.

JOHN F. X. MCGOHEY,
United States Attorney for the Southern District of New York.

ARCHIBALD PALMER,
Attorney for Defendant Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant Elias Bayer.

4395

SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for Defendant Walter V. Radovich.

4396

## Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| |
|---|
| UNITED STATES OF AMERICA<br>against<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,<br>Defendants-Appellants. |

4397 I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York on the 15th day of April in the year of our Lord one thousand nine hundred and forty-six, and the independence of the United States the one hundred and seventieth.

4398 (Seal)

WILLIAM V. CONNELL,
Clerk.

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE SECOND CIRCUIT

No 305—October Term, 1945

(Argued June 4, 1946—Decided August 14, 1946)

Docket No. 20229

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH,

DEFENDANTS-APPELLANTS

Before: L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Samuel Bayer, Elias Bayer, and Walter V. Radovich were convicted of conspiring to defraud the United States in violation of 18 U. S. C. A. § 88, and they appeal. Reversed and remanded.

Charles H. Tuttle, of New York City (Archibald Palmer and I. Maurice Wormser, both of New York City, on the brief), for defendant-appellant Samuel Bayer.

I. Maurice Wormser, of New York City (Max E. Sanders, of New York City, on the brief), for defendant-appellant Elias Bayer.

Rober Robb, of Washington, D. C. (Samuel T. Ansell, of Washington, D. C., on the brief), for defendant-appellant Radovich.

John F. X. McGohey, U. S. Attorney, of New York City (Samuel Rudykoff and Edward C. Wallace, Assistant U. S. Attorneys, both of New York City, on the brief), for appellee.

CLARK, Circuit Judge:

This appeal presents some important problems in the administration of criminal justice. The indictment, based upon 18 U. S. C. A. § 88, charged all three of the defendants with conspiring to defraud the United States of the faithful and unbiased services of

United States army officers, especially defendant Radovich. The conspiracy which it alleged was in substance that defendants Samuel and Elias Bayer arranged to become acquainted with, and to lavish gifts upon, various army officers in order to secure special noncombatant service for two soldiers closely related to them and in particular to give defendant Radovich some $7,000 to induce him to keep these men within the United States. After a verdict of guilt, with recommendation of clemency, the three defendants were given sentences of imprisonment ranging from a year and a day for Radovich and eighteen months for Elias Bayer to two years for Samuel Bayer, with additional substantial fines for the two Bayers. All appeal.

Samuel and Elias Bayer are two brothers engaged in the manufacture of yarn and thread in a corporation under the name of Plymouth Thread & Rayon Corporation, and in the conversion of thread in another corporation under the name of Thread Converters, Inc. The servicemen whose assignments they are alleged to have influenced are Martin Bayer, son of Samuel, and Melvin Usdan, nephew to both of them. War Department records introduced at the trial show a series of transfers by which these soldiers were moved, sometimes with extreme rapidity, from unit to unit throughout Eastern United States. On December 15, 1942, both Martin and Melvin enlisted in the United States Army Air Corps and within a week both were assigned, as filing clerks, to Base Headquarters at Mitchel Field, New York. April 15, 1943, they were transferred to the First Fighter Command at Mitchel Field. August 20, 1943, they became clerks to the Medical Detachment at the same field. August 28, 1943, they were transferred to separate airborne engineering units, both designated for overseas duty. November 24, 1943, they were assigned to Major Radovich's First Air Commando Group. And four days thereafter, they were transferred to the Air Transport Command, then scheduled for duty in continental United States. The case for the prosecution rested upon evidence of the methods by which these transfers were effected.

The record showed that in January, 1943, the month following the enlistment of the two soldiers, Elias Bayer became acquainted at a New York night club with two army officers stationed at Mitchel Field. The relationship immediately took on considerable warmth, for at this very meeting, Elias agreed to assist the officers in obtaining uniforms at wholesale prices. Through these two officers, Elias became acquainted with one Lt. Col. Jacobson of the First Fighter Command; and all three officers became regular callers at the Plymouth Thread office and frequent companions of either or both Bayers on social occasions. In the spring of 1943, members of the Women's Army Auxiliary Corps were re-

placing the male clerical help at Base Headquarters and the two soldiers were assigned to a pool of men scheduled to be shipped to other fields. Col. Jacobson, however, procured their transfer to the First Fighter Command at Mitchel Field. Jacobson testified that the Bayers had not asked him to do "anything improper." The transfer, however, was not displeasing to them; and a few days thereafter, Samuel gave Jacobson a birthday party at the Waldorf-Astoria, presenting him with four new tires.

The transfer to the First Fighter Command put the boys directly under the supervision of Major Radovich, who was immediately introduced to Elias by one of the officers mentioned above. Of the entire group, he soon became the most frequent caller at the Bayer's office and the most constant recipient of their gratuities. In addition to uniforms, which, like those of the other officers, were paid for by Plymouth Thread, he received golf clubs, travelling bags, theatre tickets, and other amenities. In July 1943, however, he decided to transfer the boys to another field. Radovich attributed his decision to the fact that rumors of the Bayers' generosity were circulating at Mitchel Field; the Bayers asserted that Radovich's object was to extort money. Whatever the motivation, there is no dispute that he did announce his intention to make this transfer, and that, dissuaded by Samuel Bayer, he finally transferred the boys only to the Medical Unit at the same field. It is likewise undisputed that over a period of about two weeks at the time of the transfer he received from Samuel Bayer a total of $1,900 or $1,950.

The assignment to airborne engineering units bound for overseas duty came just eight days later. The Bayers' attempts to obtain the intercession of two of their original army friends failed. In late August or early September 1943, Major Radovich left Mitchel Field to assist Col. Cochran in the organization of the First Air Commando Group, a unit being organied at Goldsboro, North Carolina, and designed to operate behind Japanese lines in Burma. In this capacity Radovich had authority to request orders for the immediate transfer of men from other units; and on November 22, he issued a special order commandeering the services of Martin Bayer and Melvin Usdan and requiring them to report not later than November 25. Within a few days of the original assignment, he requested and obtained their retransfer to the Air Transport Command, scheduled at this time for domestic duty. It was uncontested that at the time this transfer was effected, Samuel Bayer sent Elias and an unnamed indiyidual to deliver $5,000 to Radovich in the Goldsboro railroad station and that a few days after receiving the money Radovich mailed a bank cashier's check for $500 to the classification officer at Mitchel Field. The only question left in doubt was as to the motivating

force for these payments. Radovich's statement, introduced in evidence, was that, being pressed by the Bayers to take Martin and Melvin out of the airborne division, he devised the double transfer as a scheme for accomplishing that result. Statements of the Bayers, on the other hand, asserted that Radovich, entirely unbeknown to them, assigned the soldiers to his Commando Group and then demanded $5,000 for their release.

Of the many grounds for reversal urged by defendants Bayer, only two require extended discussion. As indicated in the statement of facts, the Bayers' defense was that they were the victims of a scheme of extortion on the part of Radovich. It was their contention that the boys had not received sufficient basic training to be sent overseas, that Radovich's true duty was therefore to keep them in this country, and that their own conduct was the result of his threats to violate that duty. Regardless of the trial court's opinion of the merits of this defense, defendants were entitled to have it clearly presented to the jury. *Bird* v. *United States*, 180 U. S. 356, 361; *Bollenbach* v. *United States*, 326 U. S. 607; *Thomas* v. *United States*, 6 Cir., 151 F. 2d 183. The first serious question is whether it was so presented.

The District Court in its charge told the jury that it was necessary for the prosecution to show an agreement to defraud, followed by one of the alleged overt acts. Then, in the passage objected to by defendants, it stated:

"Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer.

"The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payment of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy

existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

"However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

There is no question but that this charge was an accurate, albeit brief, statement of the law. It set forth the position of both prosecution and defense. It warned the jury that involuntary payments could not themselves be taken as showing a conspiracy. And, since there was evidence before the jury as to gratuities other than money, it correctly stated that a conspiracy might have been proved even if the payments were involuntary. The only question is whether it was so concise and so technical as to be confusing. It is the opinion of the writer of this opinion that in spite of its brevity the charge was adequate in the light of the evidence and particularly in view of defendants' failure to make a proper request to charge or a specific objection to this portion of the charge as given. Moreover, the brevity is explainable and at least somewhat justified by the general concise and unembroidered charge—a welcome relief from much judicial verbosity. My colleagues feel, however, that the statement was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact.

We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case. A majority of the court, including the writer of this opinion, find ground for reversal in a ruling excluding important evidence. To support its theory of extortion, defense called as a witness Samuel Bayer's secretary, Anne Solomon. Miss Solomon stated that on November 24,[1] Radovich telephoned from Washington making an appointment to meet both Samuel Bayer and her for lunch in New York City. She also testified that it was at this meeting that Radovich informed them of the transfer of the servicemen to Goldsboro and demanded $5,000. A clerk in the Washington

[1] She did not actually specify the date, but placed it, as Samuel had in his statement, on the same day that Martin Bayer telephoned his father about the transfer. Melvin Uslan had already testified that Martin's phone call was made on November 24. And the United States Attorney told the jury that this date was accurate, drawing the inevitable conclusion.

office of the Army Air Forces, however, had already testified that on November 24, Radovich had telephoned her from Goldsboro, North Carolina, requesting the transfer of the soldiers to the Air Transport Command.

The United States Attorney at the very end of his summation pointed up the conflict in the testimony by referring to the Bayers' story as "just another of the falsehoods" and as showing "the absurdity of Samuel Bayer's claim of extortion." Defense counsel, surprised by the turn of events, started a check of the records of the Bayers and of the telephone company and found in the Bayer file a bill showing a collect call from Washington on November 24. While the court at the outset of its charge did state that it would not allow the case to be reopened for evidence, it achieved the same result by stating the existence of the bill and what it showed; but then it added quite pointedly that "the record does not show from whom the call came." After the jury retired, defense counsel obtained from the telephone company a memorandum slip showing a call on November 24, to the Bayers by a "Capt. Ravish" from Arlington, Virginia, the location of the War Department where Radovich had been working with the Military Personnel Division. The trial judge refused to place it before the jury, however, stating that it was not shown as coming from Washington and that the proceedings were already irregular and he would not make them more irregular by calling the jury back for the further evidence.

Under the circumstances which had developed, the court's refusal to allow the correction of the evidence, made necessary by the convincing showing of the telephone slip, was error in the view of a majority of this court. There was no real doubt that the slip, although designating the call as from Arlington, just outside Washington, was descriptive of the call in question. The issue as to the fact of the call or Radovich's actual whereabouts on a particular day was, of course, not determinative; and the introduction of the slip at this time undoubtedly would have somewhat overemphasized its significance. But the summation of the United States Attorney and the charges of the court had already given the issue an entirely undeserved importance in the eyes of the jury. How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever reason—was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to

the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts.

Other assignments of error on behalf of the Bayers are without merit. It has been often held that an indictment based on this statute alone is valid without charging breach of any other federal statute. See *United States* v. *Keitel*, 211 U. S. 370, 393; *United States* v. *Antonelli Fireworks Co.*, 2 Cir., May 2, 1946. There was ample evidence to convict and to show Elias Bayer's participation, notwithstanding his vigorous contention to the contrary. And the summation for the prosecution was restrained and decorous.

In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich. In addition he makes two claims of error which require discussion. The first is in the admission of a confession which he made to a Special Agent of the Federal Bureau of Investigation on March 15 and 17, 1945. The confession was a written statement reciting in some detail that Radovich had effected transfers for the two servicemen for a consideration of $7,000 received from the Bayers. His counsel strenuously opposed its admission at trial, on the ground that the circumstances under which it was given made it involuntary under *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. The court on *voir dire* held the confession voluntary and admissible. We think this was error.

Immediately upon his return from the Chinese-Burma theatre, Radovich was ordered to report to Mitchel Field, New York, where, on August 9, 1944, the Commanding General directed his confinement pending trial by general court martial. Although charges were preferred on August 10, they were not served on the defendant or referred for trial until May 29 or 30, 1945. Meanwhile, until September 16, 1944, or for approximately five weeks, he was confined to a heavily guarded ward for the insane at the Mitchel Field hospital. Neither the prosecution nor the defense offered any professional evidence as to his mental condition at this time, though a lay attendant stated that, while fretful and crying at the time of entry, he showed no signs of abnormality or need for restraint while there. There was ample testimony, however, that he was deprived of his regular clothing and forced to eat under supervision, at first with a fork and spoon, later with only a spoon. The regular attendant stated that he was denied all use of the telephone, even for Mitchel Field calls, for approximately ten days and that, although he expressed his desire to consult an attorney, he was not allowed to do so during that period. He did, however, see counsel sometime in the first half of Septem-

ber; and one attendant stated that he believed it was prior to the initial confession on September 5 or 6. After September 16, he was under only administrative restriction at Mitchel Field, and after January 2, 1945, he was allowed greater freedom at the Field and permitted to go off it with the permission of the Base Commander. The confession in evidence was made at the United States Court House in New York City on March 15 and 17.

Article 70 of the Articles of War, 10 U. S. C. A. § 1542, provides that when any person subject to military law is placed in arrest or confinement "immediate steps" will be taken to try him or to dismiss the charge and release him. And it specifies that "when a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused a copy of such charges." The trial court construed the words "if practicable" as giving the miliary authorities peculiarly broad discretion and concluded that there was no illegal detention within the meaning of the *McNabb* principle sufficient to vitiate even the September confession. But these words, given a natural interpretation, would appear to have been inserted to provide for unusual situations arising out of the peculiar exigencies of military life. The article is mandatory in tone and expressly provides for the punishment of any officer responsible for unnecessary delay in investigating or carrying a case to conclusion. It does not seem significantly different in purpose from the various statutes cited in the *McNabb* case. Hence it ought not to be so construed as to make the *McNabb* principle applicable only where detention is by civil authorities and not where it is by military authorities. The taint of illegality found in that case seems decidedly present here where detention had existed not for two days, but for more than a month, prior to confession.

The government contends that the admissibility of the September confession is a hypothetical question having no bearing upon the March statement introduced at trial. But this argument ignores the practical realities of the situation. It is true that Radovich was not confined on March 15 or 17, 1945, and an original and independent confession made at this time would obviously have been admissible. But the present statement was not such a confession. The agent to whom it was given sent for the defendant to come to the FBI office to make a statement, and he testified that his purpose in doing so was to record certain bits of information that he had meanwhile remembered and to incorporate the two statements into one. He was not positive at whose suggestion the September confession was brought out, but he knew that it was on his desk during the entire interview and that both he and

Radovich read it before Radovich made his second statement. Government counsel refused to produce the September confession at the trial, but the court, who examined both, stated that there was no conflict between the confessions on any material matter. On these facts, we think the second statement was patently the fruit of the earlier one and that it was equally inadmissible. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338.

Secondly, Radovich also urges that the District Court should have sustained his plea in bar to the indictment on the ground of double jeopardy. He had previously been tried by general court martial for conduct unbecoming an officer and gentleman under the 95th Article of War, 10 U. S. C. A. § 1567, and for violation of the 96th or general article, 10 U. S. C. A. § 1568. The specifications on both charges were identical, namely the receipt of $7,000 for effecting the above-discussed transfers of Martin Bayer and Melvin Usdan; and the defendant was found guilty and sentenced on both charges. There is no question but that the principle of double jeopardy applies as between military and federal civil courts, *Grafton* v. *United States*, 206 U. S. 333, 11 Ann. Cas. 640; Note, *Double Jeopardy and Courts Martial*, 3 Minn. L. Rev. 181; and if the conviction were a final one, we should have little doubt but that it should be held to bar the present prosecution. The fact that the indictment charges a conspiracy to defraud under 18 U. S. C. A. § 88 does not obscure the fact that, from any realistic viewpoint, the offenses are identical. It is of course true that cases have held a conspiracy to do an act and the act itself to be separate offenses. *Carter* v. *McClaughry*, 183 U. S. 365; *Fall* v. *United States*, App. D. C., 49 F. 2d 506, certiorari denied 283 U. S. 867. But here we have a conviction on each of the two broadest and most inclusive of military charges, where the act involved required, and was alleged to include, the participation of the other defendants. *Cf. United States* v. *Zeuli*, 2 Cir., 137 F. 2d 845. Although the evidence before the court martial is not before us, it is hard to believe that a careful distinction was made, or could have been made, between the actual giving and receiving of the money for the purpose involved and the arrangement made to that end. But the record leaves the present status of the military judgment in doubt. The United States Attorney stated to the trial court that the conviction had been reversed upon the review provided by Article 50½, 10 U. S. C. A. § 1522; and by the terms of Article 40, 10 U. S. C. A. § 1511, no proceeding in which an accused is found guilty by court martial shall be held to be a trial to bar a further trial for the same offense "until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case." But defense counsel had no notice

of the reversal, the reversing judgment was not introduced, and there was no showing as to why or with what directions the conviction had been set aside. Determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial.

Reversed and remanded.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of August one thousand nine hundred and forty-six.

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

SAMUEL BAYER, ET AL., DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are reversed and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
*Clerk.*

By A. DANIEL FUSARO,
*Deputy Clerk.*

United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA

*v.*

SAMUEL BAYER, ET AL.

*Judgment*

United States Circuit Court of Appeals, Second Circuit. Filed August 14th, 1946. Alexander M. Bell, Clerk.

United States of America, Southern District of New York

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1483, inclusive, in two volumes, contain a true and complete transcript of record and proceedings had in said Court, in the case of

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*against*

SAMUEL BAYER, ALIAS SAMUEL BOYARSKY, ELIAS BAYER, ALIAS ELIAS BOYARSKY, AND WALTER V. RADCVICH, DEFENDANTS-APPELLANTS

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of September, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy-first.

[SEAL]

ALEXANDER M. BELL,
*Clerk.*

U. S. GOVERNMENT PRINTING OFFICE 1946

# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER, AND WALTER V. RADOVICH

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## ORDER ENLARGING TIME WITHIN WHICH TO PETITION FOR A WRIT OF CERTIORARI

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On consideration of the motion of the Solicitor General in the above case, and good cause therefor having been shown, it is ORDERED that the time within which a petition for a writ of certiorari may be filed herein on behalf of the United States be and the same is hereby extended to and including October 12, 1946.

Dated this 13th day of September 1946.

FRED M. VINSON,
*Chief Justice of the Supreme Court of the United States.*

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U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

*Order allowing certiorari*

Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.